DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

PROCEEDINGS AND ORDERS DATE: 102885

CASE NBR 84-1-02011 ASX
SHORT TITLE Oettinger, Albert DOCKETED: Jun 27 1985
VERSUS Oettinger, Leona G.

Date	Proceedings and Orders
Jun 27 1985	Statement as to jurisdiction filed.
Jul 31 1985	DISTRIBUTED. September 30, 1985
Aug 7 1985	Motion of appellee to dismiss filed.
Oct 7 1985	REDISTRIBUTED. October 11, 1985
Oct 15 1985	REDISTRIBUTED. October 18, 1985
Oct 21 1985	Appeal DISMISSED for want of a substantial federal question. Dissenting opinion by Justice White with whom Justice Brennan joins. (Detached opinion.)

****

JURISDICTIONAL

STATEMENT

84-2011

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No.

LEONA GORDON OETTINGER,
Appellee

versus

ALBERT OETTINGER,
Appellant

**Appeal from the Court of Appeal,
Second Circuit, State of Louisiana**

JAMES J. THORNTON
642 Stoner Avenue
Shreveport, Louisiana 71101

W. ORIE HUNTER, III
Suite 101 Energy Square
212 Texas Street
Shreveport, Louisiana 71101

Attorneys for Petitioner

MID-SOUTH PRESS - SHREVEPORT, LOUISIANA

I

QUESTION PRESENTED

Whether Article 2386 of the Louisiana Civil Code is violative of the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States of America.

TABLE OF CONTENTS

CITATIONS

STATUTES*

CASES

*When the full text of the statute appears in Appendix E, the page reference is preceded by the Symbol ►.

CASES (continued)

LAW REVIEW ARTICLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No.

LEONA GORDON OETTINGER,
Appellee

versus

ALBERT OETTINGER,
Appellant

On Appeal from the Court of Appeal, Second Circuit, State of Louisiana

---

INTRODUCTION

The appellant, Albert Oettinger, appeals from the judgment of the Court of Appeal for the Fourth Circuit, State of Louisiana, rendered on January 23, 1985. The Supreme Court of the State of Louisiana denied an application for writs of certiorari on April 1, 1985. This appeal to the Supreme Court of the United States is taken pursuant to 28 U.S.C. 1257(2). The appellee is Leona Gordon Oettinger.

OPINIONS BELOW

The opinion of the Court of Appeal for the Second Circuit, State of Louisiana, rendered on January 23, 1985, is reproduced in full in Appendix B. The unreported opinion of the trial court, the First Judicial District Court in and for Caddo Parish, Louisiana, which was rendered on the 22nd day of December, 1982, is reproduced in full in Appendix B. The Supreme Court of Louisiana denied the application for writs of certiorari and, therefore, rendered no opinion.

JURISDICTION

The opinion and judgment of the Court of Appeal, Second Circuit, State of Louisiana, was rendered on January 23, 1985. An application for writs of certiorari was lodged in the Supreme Court, State of Louisiana, and was denied on April 1, 1985. A notice of appeal to this court was filed in the Court of Appeal, Second Circuit, State of Louisiana, on June 18, 1985; that Notice of Appeal is reproduced in Appendix C.

The jurisdiction of this Court over this appeal is conferred by 28 U.S.C. 1257(2) which permits this Court to review by appeal the judgment of the Highest Court of a State in which a decision could be had "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

In his initial pleading in this iltigation, appellant, Albert Oettinger, challenged the constitutionality of Article 2386. This article of the Louisiana Civil Code (since repealed) is reprinted in Appendix D. Defendant-Appellant contended that Article 2386 was unconstitutional in the light of the Fourteenth Amendment to the United States Constitution as interpreted and applied in *Orr vs. Orr,* 440 U.S. 268, 99 S. Ct 1102, 59 L. Ed. 2d 306 (1979) and subsequent decisions. The trial court and the Court of Appeal for the Second Circuit, State of Louisiana, both held that Article 2386 of the Louisiana Civil Code was constitutional. See Appendix A, *infra.* The Supreme Court of Louisiana, voting four judges to three, refused to review the matter.

QUESTION PRESENTED

Is Article 2386 of the Louisiana Code which permits a wife to file a declaration of paraphernality which preserves the income from her separate property as separate violative of the Due Process Clause of the Fourteenth Amendment when

there is no legal provision in Louisiana which confers on a husband the same right and privilege?

THE STATUTE INVOLVED

The lone statute in question here is Article 2386 of the Louisiana Civil Code which reads in pertinent part:

> Article 2386. The fruits of the paraphernal property of the wife, wherever the property be located and however administered, whether natural, civil, including interest, dividends and rents, or from the result of labor, fall into the conjugal partnership, if there exists a community of acquets and gains; unless the wife, by written instrument, shall declare that she reserves all of such fruits for her own separate use and benefit and her intention to administer such property separately and alone. The said instrument shall be executed before a Notary Public and two witnesses and duly recorded in the Conveyance Records of the Parish where the community is domicilied.

It is this Article of the Louisiana Civil Code which appellant contends violates the Fourteenth Amendment to the Constitution of the United States of America.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States of America, Amendment XIV, Section 1: "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case is before this Honorable Court on an appeal to review the judgment of the Louisiana Court of Appeal which held that Article 2386 of the Louisiana Civil Code which afforded a wife but not a husband the opportunity of filing a declaration of paraphernality so that the fruits of her separate property would

remain separate was constitutional. The following facts are pertinent to this review.

On November 14, 1967, Albert Oettinger and Leona Gordon Oettinger married in Louisiana and set up residence in Caddo Parish. It was a second marriage for both, and each brought into the marriage substantial separate properties. Albert Oettinger arrived from New York shortly before the marriage with $134,402.50 in assets, opened accounts in a Shreveport bank and thereafter conducted business from those accounts. Everything he bought and sold is traceable through those accounts. He and Mrs. Oettinger had no premarital contract.

Leona Gordon Oettinger, despite the euphoria of romance, was shrewder or perhaps more realistic than her husband and hedged her bets. She filed two declarations of paraphernality, one just before the marriage and one a few weeks after the marriage. By and by, Mrs. Oettinger's sense of practicality proved sound. On July 27, 1978, Mrs. Oettinger filed suit for a judicial separation which was eventually reduced to judgment. A judgment of divorce followed. Thereafter, proceedings ensued over who would get custody of the assets via a community property settlement.

The 1970s saw a steady erosion of the laws of the several states which were gender oriented. In 1979 prior to the community property litigation in this case, the Supreme Court of The United States in *Orr v. Orr*, 59 L.Ed.2d 306 (1979) sounded the death knell for gender oriented laws and the legislature rewrote the community property laws of this state sweeping the last vestiges of inequality among the sexes. This was Act No. 709 of 1979 which is now the law governing matrimonial regimes. Under this Act, the declaration of paraphernality became available to both husbands and wives.

Albert Oettinger attacked Article 2386 as being repugnant to the Fourteenth Amendment of the United States Constitution and the Constitution of the State of Louisiana. He

argued that the judicial holdings against gender oriented laws which culminated in *Orr v. Orr, supra,* made Article 2386 obviously unconstitutional, so obviously unconstitutional, in fact, that the Louisiana Legislature promptly rewrote it and made it available to husbands as well as wives. The trial court found nothing constitutionally wrong; the Court of Appeal in an opinion that, considering the issues raised was a monument to brevity, affirmed. The Louisiana Supreme Court refused to review the matter. We now file this appeal.

THE QUESTION IS SUBSTANTIAL

On November 14, 1967, plaintiff, Leona Gordon Oettinger, and defendant, Albert Oettinger, married in Louisiana. It was the second marriage for both. Defendant had been a resident of New York; just prior to his marriage he established residency in Shreveport. When he married, he had substantial assets which included stocks, bank accounts, a small business and a Mercedes automobile. It amounted to $134,402.50.

Plaintiff also had large financial interests which *inter alia* consisted of her community interest in properties acquired by her late husband, Sylvian Gamm. Shortly before she married defendant, plaintiff recorded a declaration of paraphernality under the authority of Article 2386 of the Civil Code; a few weeks after her marriage she filed a second declaration which in languaged tracked her premarital one.[1] Defendant remained blissfully unaware of this extraordinary departure from honeymoon decorum, and plaintiff did not disillusion him by confessing it. Like a paid-up insurance policy it lay inert in the shadows until the grand moment of need.

Inexorably, as in the march of time, the honeymoon ended as did the marriage. In the summer of 1978, the two separated, and plaintiff filed for a judicial separation on July 27, 1978.

[1]Evidently, Mrs. Oettinger was in doubt whether a declaration filed before marriage was effective.

Subsequently, judgments of separation and divorce followed. The initial petition was an action to establish the property rights of each.

From the beginning, appellant challenged the constitutionality of certain features of the community property system of Louisiana. Article 14 of defendant's answer states:

> "Louisiana law as written, interpreted and applied has since its inception conferred special property rights on women and discriminated against men in the following nonexclusive particulars.
> (a) Article 2386 of the Louisiana Civil Code confers rights on women not enjoyed by men in that it permits the wife to retain separately earnings from her paraphernal estate but confers no such rights to men;
> (b) Louisiana jurisprudence recognizes different rules for women and men in tracing properties and funds back to their separate estates;
> (c) Louisiana law and jurisprudence sets out irrebuttable presumptions against husbands in realty transactions when certain declarations fail to appear in the deeds although with respect to women the absence of such declarations may be overcome by evidence; and
> (d) Louisiana law permits women to maintain intact the integrity of their separate estates although the husband may not do so."

Appellant contends that these features of Louisiana law consisting of codal articles and their judicial construction were violative of the Due Process and the Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. This is not an idle challenge. A cursory reading of the cases cited below manifests beyond peradventure a belief by the United States Courts that the Louisiana community property system made shambles of the Equal Protection and Due Process clauses of the Fourteenth Amendment. Indeed, this is precisely why the Louisiana Legislature rewrote the provisions and corrected the very features we call into question in

this suit.

Before treating the unconstitutionality of Article 2386 of the Civil Code we wish to lay to rest an argument appellee raised and which we are wont to characterize uncharitably as a "red herring." Counsel persists in accusing appellant of trying to apply the unconstitutionality of Article 2386 retroactively. We therefore shall take some time at the outset clarifying what "prospective" and "retroactive" applications really are.

Throughout this litigation counsel for appellee has misunderstood and misinterpreted the thrust of appellant's argument. He terms it a retroactive application of law.[2] *Appellant does not ask for a retroactive application of law and does not require retroactive application for him to prevail.* It is essential at the beginning of the brief that the Court understand this and further recognize why this is so. Because we are asserting the invalidity of Louisiana community property law *in this case,* doing constitutional justice to these two parties does not involve retroactive application. Only if appellant should prevail here *and* the law of this case is used to *reopen* old matters which by judgment have become definitive would retroactivity be at issue. Retroactivity involves application of a decision to matters already *settled by judgment or compromise.* Appellant has chosen to raise this constitutional issue *in this case* in timely fashion; as to these two parties retroactivity has no meaning.[3] We do not believe plaintiff's counsel ever grasped this fact. There is ample judicial authority to explain and sustain our view. *In fact, we know of none to the contrary.*

---

[2]We are in part responsible for his misunderstanding. We erroneously used the term retroactive in our pleadings. Sad to say that at that point in the development of our ideas we were a bit foggy. This is why we take such pains at the beginning of this presentation to set things aright.

[3]There would be no sense in raising a constitutional issue if it could not benefit the litigant but only future parties. *Always* the litigant raising the issue gets benefit from it if he prevails on the issue; *retroactivity* came into play *only* when the courts were faced with a barrage of petitions to reopen cases that had already been judicially settled. Hence, in this case, if Louisiana property laws relating to community and paraphernal regimes were unconstitutional in 1978 when these parties separated, and if defendant raised the point in timely fashion in a suit between the parties, such a finding does not constitute retroactivity.

With this in mind and confessing that we can state the issue no more clearly than we already have, we must look to jurisprudence to determine whether Louisiana law with reference to community and paraphernal estates was violative of the "equal protection" and "due process" clauses of the Fourteenth Amendment to the United States Constitution.

One other phase of retroactivity should be inserted. In 1979 (as an outgrowth of *Orr v. Orr, supra,)* the Louisiana legislature changed our community property and domestic relations law to promote equality between the sexes. It was obvious recognition that Louisiana's community property laws did violate the Due Process and Equal Protection of the Law clauses. The new law was effective in 1980. If we asked the Court to apply the 1980 law to a 1979 situation, *that would be a retroactive application.* To the contrary, a finding that the old law was unconstitutional as of 1978 and the application of that finding to do justice between these parties is *not retroactive application.*

THE UNITED STATES SUPREME COURT *DEFINES PROSPECTIVE AND RETROACTIVE*

Several landmark decisions of the United States Supreme Court illustrate definitively the true meanings of "prospective" and "retroactive" in the application of decisions.[4] In *Cipriano v. Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647, (1969), the Supreme Court was confronted with the "retroactive" or "prospective" application of its decision declaring invalid a bond election because of the unconstitutionality of the Louisiana law that limited participation to property tax payers. The Court stated:

[4]The discussion of retroactive and prospective application here deals exclusively with "decisions" as opposed to new statutes. Only the application of judicial decisions concerns active litigants. Because we are here advancing the well accepted thesis that even prospective application nonetheless benefits the party challenging the constitutionality, we have limited our citations to those cases in which decisions are announcing "new law".

"Significant hardships would be imposed on cities, bondholders and others connected with municipal utilities if our decision today were given full retroactive effect. Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for awarding the 'injustice or hardship' by a holding of retroactivity. [citations] Therefore, we will apply our decision in this case prospectively. *That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final.* Thus the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision. Of course, our decision will not affect the validity of securities which have been sold or issued prior to this decision and pursuant to such final authorization."

"Prospective" application was treated by the United States Supreme Court to include relief for the party who, still in litigation, raised the constitutional issue and to others who could in timely fashion legally challenge an election. "Retroactivity" occurs *only* when the holding is applied to cases or instances that are legally final, i.e., *res judicata.* There is scarcely an incentive to raise a constitutional argument if the challenge is given validity but the litigant raising it gets no benefit.

Indeed, this latter argument was set out by the Court in *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The applicant was a victim of an identification procedure when no counsel for the accused was present and which led to his conviction. Later, in *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 and *Gilbert v. California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (decided together) the identification procedures were declared unconstitutional. In the *Stovall* case the constitutional issue had not been raised in the proceedings. At issue was whether the *Gilbert* and *Wade* rule should be applied "retroactively" to

benefit Stovall. In a lengthy discussion, the Court concluded that it should not apply to those convictions "now final". The Court then remarked:

> "We recognize that Wade and Gilbert are therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. *That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions.* Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making." (Emphasis supplied)

Prospective application provides a benefit to the litigant raising the issue and all future litigants. Sometimes, but not often, as in *Stovall*, even other cases not yet final may not get the benefit.

The Courts of Louisiana have long been in accord with these principles. Nowhere is appellant's thesis better supported than in *Succession of Brown*, 379 So.2d 1172 (La. App. 2d Cir., 1980)., *aff'd*, 388 So.2d 1151 (Sup. Ct. 1980). This litigation defined the rights of several illegitimate children and one who had been legitimated by adoption. Under existing law, the legitimate heir excluded the illegitimate ones. This had always been the law; indeed the exclusion of illegitimates by legitimates (Civil Code Article 919) had in 1971 been held constitutional by no less than the United States Supreme Court. (See *Labine*

v. Vincent, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288). With this sound foundation, the heir who was legitimate was placed in possession of the estate of his late father. The illegitimate children challenged the constitutionality of the law and prevailed. There was no discussion of retroactive application; the parties in this litigation *were* benefited. The Court speculated on the future stability of land titles; the unmistakable inference from the Court's language was that prior successions already decided and judicially definitive would be left intact. If, and *only if*, the Court did apply *Succession of Brown* to judgments already settled and definitive would the decisions be retroactive.

The ruling in *Kirchberg v. Feenstra*, 609 F.2d 727 (5th Cir., 1979) *aff'd.* 67 L.Ed.2d 428 (S.Ct. 1981) lays to rest the arguments of plaintiff's counsel on what constitutes retroactive application. Kirchberg, an attorney, accepted as a fee from a husband a promissory note secured by a mortgage on the Feenstra home. The mortgage was dated and recorded in 1974 when Louisiana law permitted the husband as head and master of the community to mortgage community property without the wife's knowledge or consent (Civil Code Article 2402). The Feenstras split, and Mrs. Feenstra obtained the home in settlement of the community. Her world of contentment shattered when Kirchberg began foreclosure proceedings. Kirchberg anticipated some of Mrs. Feenstra's objections and filed an action for declaratory judgment in the United States District Court. In her answer Mrs. Feenstra validated Kirchberg's prescience, but additionally challenged the constitutionality of Article 2404.

We will have more to say later about the constitutional holding in this case. The relevant point here is that the Fifth Circuit adopted Mrs. Feenstra's argument and made its holding "prospective" only.

> "We apply our decision today prospectively only,

because a holding of retroactive invalidity of Article 2404 would create a substantial hardship with respect to property rights and obligations within the State of Louisiana. The Supreme Court has said:

> 'The actual existence of a statute, prior to [a determination of unconstitutionality], is an operative fact and may have consequences which cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, — with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in light of the nature both of the statute and its previous application, demand examination.' (*Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374, 60 S.Ct. 317, 318-319, 84 L.Ed. 329 (1940). (609 F.2d at (735)"

The Court then commented that the "concept of the husband as head and master of the community" has been a part of Louisiana law since even before the Louisiana Code of 1808. "Since our decision could produce substantial inequitable results if applied retroactively we avoid that 'injustice and hardship' through a holding on nonretroactivity." (609 F.2d at 735-736).

This was the Fifth Circuit opinion and when he read the word "prospectively" Kirchberg was elated. He reasoned, as appellee's counsel does here, that a prospective application meant that the mortgage which had secured his property rights and on which he had relied would not be affected. Alas, he could not have been more wrong.

Justice Marshall, delivering the opinion of the Supreme Court, made short shrift of Barrister Kirchberg's dying thrusts.

> "Appellant's final contention is that even if Article 2404 violates the Equal Protection Clause of the Fourteenth

> Amendment, the mortgage he holds on the Feenstra home is nonetheless valid because the Court of Appeals limited its ruling to prospective application ... appellant urges this Court to adopt the latter interpretation [application of the invalidity between December 12, 1979, date of this Court's decision and January 1, 1980, date of new law] on the ground that a contrary decision would create grave uncertainties concerning the validity of mortgages executed unilaterally by husbands between 1974 and the date of the Court of Appeals' decision
>
> "We decline to address appellant's concerns about the potential impact of the Court of Appeals' decision on other mortgages executed pursuant to Article 2404. The only question properly before us is whether the decision of the Court of Appeals applies to the mortgage in this case, and on that issue we find no ambiguity. This case arose not from any abstract disagreement between the parties over the constitutionality of Article 2404, but from appellant's attempt to foreclose on the mortgage he held on the Feenstra home. Appellant brought this declaratory judgment action to further that end, and the counterclaim asserted by Mrs. Feenstra specifically sought as relief 'a declaratory judgment that the mortgage executed on [her] home by her husband ... is void as having been executed and recorded without her consent pursuant to an unconstitutional State statute.' *Thus, the dispute between the parties at its core involves the validity of a single mortgage, and in passing on the constitutionality of Article 2404, the Court of Appeals clearly intended to resolve that controversy adversely to appellant.*" (Emphasis supplied.)

Appellee's counsel raises in the spector of impaired vested interests the same considerations the Courts have laid to rest in numerous cases, some of which we have already cited. Justice Harlan took special pains to address this matter in a concurring opinion in *United States v. Donnelly*, 397 U.S. 286, 90 S.Ct. 1033, 25 L.Ed.2d 312 (1970):

> *"The impulse to make a new decisional rule nonretroactive rests, in civil cases at least, upon the same considera-*

tions that lie at the core of stare decisis, namely to avoid jolting the expectations of parties to a transaction. Yet, once the decision to abandon precedent is made, I see no justification for applying principles determined to be wrong, be they constitutional or otherwise, to litigants who are in or may still come to Court. The critical factor in determining when a new decisional rule should be applied to a transaction consummated prior to the decision's announcement is, in my view, the point at which the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen. Just as in the criminal field, the crucial moment is, for most cases, the time when a conviction has become final, see my Desist dissent, supra. *So in the civil area that moment should be in when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have become res judicata.* Any uncertainty engendered by this approach should, I think, be deemed part of the risks of life.

"These considerations, I believe, underlie the Court's holdings in *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 84 L.Ed. 329, 60 S.Ct. 317 (1940), where the Court refused to upset a *judgment* based on a subsequent change in the law, and *Cipriano v. City of Houma,* 395 U.S. 701, 23 L.Ed.2d 647, 89 S.Ct. 1897 (1969), where we held that municipal bonds, authorized by invalid referenda, would not be subject to challenge 'where, under state law, the time for challenging the election result has ... expired.' 395 U.S. at 706, 23 L.Ed.2d at 651.

* * * *

"The essential point is that while there is flexibility in the law of remedies, this does not affect the underlying substantive principle that *short of a bar or res judicata or statute of limitations,* courts should apply the prevailing decisional rule to the cases before them." 25 L.Ed.2d at 319, 320. (Emphasis supplied.)

What Justice Harlan stated and the United States Supreme Court has consistently held, as the cited cases abundantly show, we also contend here. Prior to 1980 when the new

laws of community property took effect, tens of thousands of community property settlements and judgments on contested property rights arising out of community property claims had finalized the rights of husbands and wives under the old law. Under the federal decisions these would be disturbed only if this Court were to apply retroactively a judgment invalidating Article 2386. But appellee in this suit, Mrs. Oettinger, has no vested rights. She has neither a voluntary, contractual settlement nor a definitive judgment delineating her property rights. Her rights are still in limbo, subject to challenge. Indeed, that is precisely what this suit is all about. She has even less in the way of vested rights than the legitimate child in the *Succession of Brown,* 379 So.2d 1172, *aff'd.,* 388 So.2d 1151 (1980) who at least had in his favor a judgment of possession which is a universally recognized increment of title, and Mrs. Oettinger had infinitely less than our brother attorney in *Kirchberg v. Feenstra,* 609 F.2d 727 (5th Cir., 1979) *aff'd.,* 67 L.Ed.2d 428 (S.Ct. 1981) who certainly had a recorded 1974 mortgage signed by a husband which Louisiana law had designated as head and master of the community and who could clearly alienate community assets without the consent or even knowledge of his wife. Whatever Mrs. Oettinger's degree of reliance she could scarcely have felt more legally comfortable than the legitimate son of Sydney Brown or the expectations of Mr. Kirchberg who slept soundly at night in the certainty that his fee for legal services was as secure as the Rock of Gibraltar and Prudential Insurance Company.[5]

We have gone to considerable length to bury the spector of "retroactivity". The simple fact is that retroactivity is not relevant here. Although a large number of cases decided on constitutional grounds are applied "retroactively", *i.e,* to suits which have become final and *res judicata,* this Court may find equitable and substantial reasons for a prospective application here. So be it. But surely it is manifest by now that a

prospective application, as the cited cases abundantly illustrate, gives relief to the party litigant raising the issue, in this case appellant. *Oettinger v. Oettinger* is not final; Mr. Oettinger, like Mrs. Feenstra, raised the constitutional issue as early as it could have been advanced, that is, when Mrs. Oettinger filed for a community property settlement which involved a designation of what was community and what was separate. If this Court wishes to make a ruling to be applied retroactive and open up for relitigation thousands of community property judgments and settlements made in reliance on the old law: fine and dandy. All we are saying, and our song is in harmony with the music of the nation's highest court, as well as Louisiana's Supreme Court in *Succession of Brown,* holding that the elements of the old law at issue here are unconstitutional *and* the additional decision to make the holding prospective still must afford relief to Albert Oettinger who raised the issue and whose rights have not been previously and finally adjudicated. This is the meaning of "prospective"; it is the only meaning that makes sense and has legal support.[6]

What this case really involves is the following:

[5]Actually Mrs. Oettinger's sole reliance was on Article 2386 which insured that upon filing a proper declaration, which she did while still in the warm glow of honeymoon tenderness, her income from her paraphernal estate would remain separate. A nonretroactive invalidation of Article 2386 need not disappoint Mrs. Oettinger's reliance. Professor Lee Hargrave in 41 La.L. Rev. at p. 534 after explaining that prospective applications *do* include the parties who assert the constitutional issue, i.e., the parties in the case being decided, states the solution as follows:

> "A proper solution would be to avoid the question of retroactive or prospective application and simply say the proper remedy, as in most equal protection cases, is to extend the benefit in question to the excluded class."

Professor Hargrave cites *Califano v. Goldfarb,* 430 U.S. 199 (1977); *Weinberger v. Wiesenfield,* 420 U.S. 636 (1975); *Shapiro v. Thompson,* 394 U.S. 618 (1969). Surely counsel for appellee will not demean the charity of his client by asserting that she also relied on her legal right to rape the paraphernal estate of her ex-husband while maintaining the virginity of her own intact. The proper remedy is obviously the one suggested in most of these cases: give to Mr. Oettinger the same protection that was enjoyed by Mrs. Oettinger. This is what was done in the alimony cases: give the right to the man to obtain alimony rather than absolve husbands from paying alimony to wives. See *Orr vs. Orr, supra.*

[6]There are no third party rights at issue here. But even if there were, this Court could well do justice to these two parties and leave third parties with vested rights undisturbed. The spector that appellee raises about disturbing past titles is just that: a spector which like all spectors fades in the glare of rational analysis. To hold in appellant's favor in this case and make the holding nonretroactive will threaten not one title in the State of Louisiana. To deny Oettinger relief under such a spector would be absurd: "the right without the remedy" which according to Mr. Justice Holmes *was* the ghost that ever haunts the law.

a. Was Article 2386 which allowed the *wife but not the husband* to preserve her paraphernal property intact unconstitutional as giving a preference without social justification to one sex over the other?
b. If so, what remedy will equalize the rights of the parties?

THE UNCONSTITUTIONALITY OF ARTICLE 2386

Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102 59 L.Ed.2d 306 (1979) erupted on the judicial scene with shattering suddenness. Prior to *Orr* the gentler sex whose dainty hands manipulated much of the nation's wealth and whose lilting, soprano commands set the knees of strong men shaking, also enjoyed both advantages and disadvantages in the community property laws of Louisiana. To be sure, *Orr v. Orr* did not rise like some phoenix from the swampy morass of Louisiana property laws; instead, some Alabama Dagwood Bumstead rebelled against legal serfdom and challenged the Alabama law of alimony, previously a matrimonial tax exclusively of benefit to unwanted wives. But no Louisiana attorney could read the strident tones of the *Orr* Court without recognizing that its holding sounded the death knell for gender-based classifications in Louisiana community property laws. If nothing else, this was a mind boggling certainty. Even the Louisiana Legislature, never celebrated for either energy or vision, knew that a redrafting of the community property system was in order.

The *Orr* decision was not a maverick decision; it could have and should have been predicted. In *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) the Supreme Court emphasized that statutes distinguishing between male and female are "subject to scrutiny under the Equal Protection Clause". To withstand constitutional challenge the *Reed* Court made it abundantly evident that classifications by gender must be finely attuned to those aims. Subsequent cases hardened the

line and whittled away at the plethora of justifications, some esoteric in the extreme, asserted by the States. See *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975).

Then came *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975) which held that the *Reed* case required the invalidation of a Utah Statute which differentiated by sex on the age of majority. The Court stated once again:

> "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

The Supreme Court rejected Utah's attempts at justification. The opinion cited numerous cases holding that classifications based on sex are inherently suspect. *Weinberger v. Wiesenfeld, supra; Schlesinger v. Ballard, supra; Geduldig v. Aiello*, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974); *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); *Frontiero v. Richardson, supra;* and *Reed v. Reed, supra.*[7] The *Orr* decision should scarcely have come as a surprise.

Orr v. Orr, supra, was the culmination in the wave of decisions represented in these cases. Essentially, the Alabama statute made alimony payable only by a husband. The issue posed was whether this distinction in obligation nakedly based on gender could be justified by any meaningful social objectives. Spokesmen for the Alabama law did not surrender easily.

In setting out the issue, the Court said:

[7]Again, we repeat that in all these cited cases, regardless whether the Courts opt for prospective or retroactive application, or are silent on that issue, relief is *always* by the United States Supreme Court to the party litigant who raised the issue, even if he alone enjoys the benefit as in *Stovall v. Denno, supra.*

a. "In authorizing the imposition of alimony obligations on husbands, but not on wives, the Alabama statutory scheme provides that different treatment be accorded ... on the basis of ... sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause..." (59 L.Ed.2d at 318, 319)

b. "The fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny." (59 L.Ed.2d 319)

c. " 'To withstand scrutiny' under the equal protection clause, 'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.' " (59 L.Ed.2d 319) (This was the *Reed v. Reed* test.)

The Court summarily rejected the routine state purpose, the creation of a milieu in which the female is "destined solely for the home and the rearing of the family, and only the male for the marketplace and world of ideas." But the Alabama Supreme Court's opinion had upheld the alimony law on the ground that financial help for the wife was a simple compensation for past discrimination of women which had left them in many cases unprepared to fend for themselves in the working world. This, contended the Alabama Court, is a worthy objective. "It only remains, therefore," said the United States Supreme Court "to determine whether the classification at issue here is 'substantially related to the achievement of those objectives.' " The Court found to the contrary. Not only was this discrimination not substantially related to acceptable governmental goals, it could do much to perpetuate the very inequality it sought to erase.

> "Moreover, use of a gender classification actually produces perverse results in this case. As compared to a gender-neutral law placing alimony obligations on the spouse able to pay, the present Alabama statutes give an advantage only to the financially secure wife whose husband is in need. Although such a wife might have to pay alimony under a gender-neutral statute, the pre-

sent statutes exempt her from that obligation." (59 L.Ed.2d at 321)

In short, the real protected class was rich wives, not the needy ones who would receive alimony anyway. Needy wives by definition could scarcely be called on to pay alimony under any system.

> "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection. [citations] Thus even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored. Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender-classifies and therefore carries with it the bagage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex. And this is doubly so where the choice made by the State appears to redound — if only indirectly — to those without any need for special solicitude." (59 L.Ed.2d at 321)

The case was remanded.[8]

We ask the indulgence of the Court in spelling out in more detail than is perhaps necessary the reasoning of the Court and the rejection of the governmental aims raised by the State. The devastating counter-argument of the Court in *Orr v. Orr* is equally fitting in invalidating Louisiana Civil Code Article 2386. The needy ex-wife is hardly benefited by Article 2386 because by definition she has no paraphernal estate to preserve and protect. Article 2386 clearly confers a bonanza for rich women, excludes impecunious women and all men, rich

[8]Mr. Orr had not contended any unconstitutionality of the alimony laws when the alimony was fixed. In fact, the alimony was apparently set out in a stipulation between the parties which was then Court approved. Mr. Orr raised his constitutional challenge in a proceeding in which he had been dragged into Court on a contempt charge. The Court remanded the matter for a consideration by the State Courts of state procedural matters, among them, whether the *voluntary stipulation* (rather than a gender based law decision) might yet bind him to his alimony obligation.

and poor alike.[9] It was, in effect, (before its amendment), a gender-based classification without an acceptable governmental objective. Appellee's counsel basically recognized this although he presents a feeble justification for Article 2386, praising it as an attempt to compensate the wife for wrongs done to her in other community property laws, a sort of balancing of rights.

No one could read *Orr v. Orr*, (not to say the other decisions as well) analytically and remain comfortable with the decision of the Louisiana Court of Appeal in this case. A set of gender-based classifications that are constitutionally invalid can scarcely be balanced against a second set of invalid gender-based classifications to achieve justice. Such a proposition is not only lousy constitutional law, it scarcely makes any sense at all. *All* gender-based classifications are to be scrutinized; there is noting in the *Orr v. Orr* language to infer that one invalid statute may cancel out another. When the Fifth Circuit and United States Supreme Court in *Kirchberg v. Feenstra, supra*, nullified Article 2404 which designated the husband as head and master of the community, they certainly wasted no time trying to decide if articles like 2386 were worthy of retention to offset the pernicious inequalities of Article 2404, or whether making the husband master of the community was a just reward for his being excluded in Article 2386. Counsel may not assert that these articles must be balanced and viewed in *para materia;* we have found neither constitutional mandate nor Court decision in all these gender-based classification cases which supports such an ingenious but unique legal approach. In all instances the Courts have treated *each* gender-based classification and has subjected *each* to the critical standard of equal protection of the law.[10]

[9]One is reminded of a droll observation about the medieval laws of the *Ancien Regime*. "The magnificent equality of the law," intoned Anatole France, "which prohibits rich and poor alike from stealing their bread and sleeping under the bridges at night." As in George Orwell's *Animal Farm*, under Article 2386, all women are not realistically equal because some are more equal than others.

Counsel's contention that Mr. Oettinger had the right and opportunity to contract with Mrs. Oettinger prior to their marriage has been judicially dealt with and convincingly rejected. In *Kirchberg v. Feenstra, supra,* Kirchberg argued that Mrs. Feenstra by a pre-marital contract or by a simple authentic act could have avoided her tragedy. By her inaction, argued Mr. Kirchberg, Mrs. Feenstra consented to the designation of her husband as head and master of the community with all of the attendant opportunities to fritter away her community interest in her home.[11]

The Court took extraordinary pains to lay this contention to rest:

> "While much has been said by the district court and by the State of Louisiana about Mrs. Feenstra's having made a free choice, the record contains no evidence that she did so. To the extent that any choice has been made, it has been made by the State of Louisiana. To paraphrase the district court's opinion, since Mr. and Mrs. Feenstra did not specify a particular regime, the law has provided one for them. The law — Article 2404 of the Louisiana Civil Code — is an act of the State of Louisiana, not of Mrs. Feenstra. Under the fourteenth amendment, this is a fundamental difference. When the choice is made by the government, the obligation to afford all persons the equal protection of the law arises. (609 F.2d at 733)
>
> • • • •
>
> "The State urges that because a couple contemplating

[10]No doubt Alabama had many laws which favored men over women. It is interesting to note that the *Orr* Court did not cite them as compensations to some husband who might claim and need alimony.

[11]No doubt this came as a surprise to Mrs. Feenstra whose "consent" in all these matters was the one thing Messrs. Kirchberg and Feenstra had not bothered to solicit. Her opportunity to have prevented the mortgage arose out of the last portion of Article 2334 which read as of the time the Feenstra mortgage was made:

> "Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated."

Article 2334 was amended in 1976, effective January 1, 1977.

marriage could specify some other type of arrangement in an antenuptial contract, there is no insurmountable barrier preventing a husband and wife from choosing a form of management acceptable to them, and, accordingly, no state-imposed, gender-based classification. *This analysis, however, fails to take into account the fact that the Louisiana law places the burden and expense of obtaining a lawyer and preparing a non-traditional marriage contract on couples wishing to make the wife the community manager and it does not place that burden and expense on couples wishing to make the husband the manager.* That it places the same burden on couples seeking other non-traditional forms of community management, such as joint management, is irrelevant. The classification is not facially neutral but explicitly favors management by husbands and disfavors any involvement in management by wives. Because husbands can be made managers by agreement of the parties to the marriage without transactional costs and wives cannot, the Louisiana law extends a benefit to men that is not extended to women. Article 2404 thus establishes a gender-based classification that is subject to fourteenth amendment analysis." (Emphasis supplied) (609 F.2d at 733, 734)[12]

We know of no legal authority who is not persuaded today that the gender-based classifications in Louisiana community property system were unconstitutional. We say "were" because it was a recognition of this fact that impelled the legislature to repeal them and *grant* equal rights in each case either to the husband or the wife, whichever had previously been excluded. See Katherine S. Spaht, "Background of Matrimonial Regimes Revision," *La.L.Rev.*, Volume 39, Number 2, (Winter 1979) pp. 339, 340.

[12]*Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) concerned an illegitimate who claimed that his exclusion from her father's succession was unconstitutional. Illinois sought to defend its succession laws by arguing that the decedent could have provided for his illegitimate offspring by writing a will and making them legatees. His failure to do so, said the State, was his choice. The Court rejected the argument: "Hard questions cannot be avoided by hypothetical reshuffling of the facts."

It was clear that by 1977 most Louisiana legal authorities knew that under prevailing constitutional imperatives, gender-based classifications in Louisiana's community property system were invalid. Indeed, in that legislative session bills with far-reaching changes in Louisiana's community property system were introduced. Instead the matter was referred to a special committee because a consensus felt that the revision should be systematic rather than piecemeal.[13]

As the revisionists moved slowly forward, several key decisions occurred. They follow one another in the same volume of reported decisions. The first, *Loyacano v. Loyacano,* 358 So.2d 304 (S.Ct. 1978), *on reh.*, 358 So.2d 304, concerned Article 160 of the Louisiana Civil Code. By interpretation it allowed alimony to the wife only; was this gender-based classification valid? The Court was sharply divided but the decision of Judge Dennis adeptly avoided the issue by asserting that the judiciary could interpret it to allow husbands the same privilege.

> "The argument on federal constitutional grounds may have merit. We do not consider it here, however, for we agree that to allow only wives to collect alimony after divorce would amount at least to arbitrary and unreasonable discrimination against persons because of sex and thus a denial of equal protection under the Louisiana Constitution." (358 So.2d at 307)

The Court reasoned that in a civil law jurisdiction "the absence of express law does not imply a lack of authority for courts to provide relief". Naturally one of the justices in a concurring opinion simulated profound horror at "legislation by the Court", a phrase he used to characterize the suggestion of Judge Dennis that the Courts should reinterpret Article 160 to allow alimony to ex-husbands.

[13]Instead of passing these bills, the legislature instead adopted Senate Concurrent Resolution 54 which created a joint committee of five House and a like number of Senators to draft revised community property laws. An advisory group of six persons was formed to assist the joint committee.

Corpus Christi Parish Credit Union v. Martin, 358 So.2d 295 (S.Ct. 1978) was yet a more arresting case. In 1974 Mr. Martin had mortgaged the family home to pay off an indebtedness against his mother's property. This burst of filial affection by Mr. Martin, the one who in his marriage vows promised to put aside his mother in favor of his bride, was too much for Mrs. Martin who did some forsaking of her own. She also gave a candid account of her feelings about the mortgage to the Credit Union who smugly replied that she could do nothing about it. The Credit Union foreclosed and Mrs. Martin invoked the equal protection clause of the United States Constitution against Article 2404 of the Louisiana Civil Code which permitted Mr. Martin to perform his dastardly deed without Mrs. Martin's permission. Four justices in a final attempt to salvage an article everyone knew was invalid and would be changed, avoided the constitutional issue. They reasoned that because Mrs. Martin could have put of record a declaration preventing Mr. Martin from doing what he did, there had been no insurmountable barrier to Mrs. Martin's protection. To the majority, there was no reason to meet the constitutional issue posed by Mrs. Martin. There was an additional bit of tortured reasoning that if both were allowed to alienate (and someone needed the power to do it) the mortgage would still be valid. The performance of the majority had to be tongue in cheek. Indeed, the majority opinion was generally ignored. The dissent of Justice Tate (now on the United States Fifth Circuit Court of Appeals) joined by Justices Calogero and Dennis, received much more attention.

Before summarizing the dissent, it should be noted that the justification of the *Corpus Christi Parish Credit Union* Court, ie., that Mrs. Martin could have filed a declaration, would soon be brushed aside with disdain by both the United States Fifth Circuit Court of Appeals and the United States Supreme Court in *Kirchberg v. Feenstra, supra.* Nor had that excuse availed

states which had raised it earlier.[14]

The majority group knew that as well as the dissenters. Justice Tate gently (as is always his nature) chided the majority for its failure to confront the issue Mrs. Martin had posed:

> "It is unfortunate that the majority did not reach the issue of unconstitutionality so clearly posed. *For reasons to be noted, the statutes are obviously unconstitutional.* The legislature, which is in the process of revising the community property system, should have had the benefit of the views of this Court as to the constitutional questions at issue. (Emphasis added)
>
> "We can only surmise that, in view of this probability of legislative attention to the problem, the majority wished to avoid the disruption in dealing with community-held property which might result from a present judicial declaration of the obvious unconstitutionality of the present provisions."

Justice Tate then cited the by then lengthy list of decisions which had invalidated gender-based classifications. The opinion of Justice Tate is well worth reading. It is clear from the dissent that all gender-based classifications in the community property system were unjustified by governmental objectives and, therefore, constitutionally invalid.

We pause here to hark back to a topic discussed earlier: the meanings of "prospective" and "retroactive" in the application of decisions. Justice Tate stated that the fears of the majority about disruption of the system could well have been avoided by prospective application only. But note how his understanding of prospective application coincides with that of the United States Supreme Court:

> "Nevertheless, the preferable view is that, in the case before the court, the declaration of invalidity should be applied, lest the judicial declaration be considered merely

[14]The same argument was summarily overruled in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) a year earlier. Illinois, just like the majority opinion in *Corpus Christi Parish Credit Union* has stressed all the ways the decedent could have provided for his illegitimate offspring by will, adoption, legitimation, etc.

> as dicta. [citations] For this reason and because of certain equities peculiar to the instant case, we would affirm the district court's ruling in the case before us that the execution of the mortgage by the husband did not affect the wife's interest in the immovable property to which title stood in her name as well as the husband's but we would specifically hold that our declaration that La.C.Civ.Arts. 2334 (1962) and 2404 are unconstitutional in this respect shall not affect any other transactions or acts accomplished prior to the date set forth below."

May we now say that the overwhelming number of decisions which are given prospective application only nonetheless provide relief for the successful litigant whose case occasioned a change in the law?[15]

The codal article basically at issue here is 2386. It allowed the wife but not the husband to file a declaration of intent to administer her paraphernal property. In essence, it permitted income from the wife's separate property to remain separate. This was again a gender-based classification which according to all the jurisprudence in this area is "invidious" when it differentiates without sufficient justification solely on the basis of sex.[16] "To withstand constitutional challenge ... classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.[17] The party asserting the constitutionality has the burden of showing a governmental object attainable and worth of attainment in the gender-based classifications.[18]

[15]Despite Justice Tate's references to equities in this case, it is difficult to see how a right could be better vested than the credit union's claim on Mrs. Martin's one-half ownership. As attorneys, we have given title opinions on matters far less secure. Vested rights in these cases are apparently like religious commandments: made to be broken.

[16]Justice Tate, 358 So.2d at 301.

[17]*Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457 So. L.Ed.2d 397, 407 (1976) quoted with approval by Justice Tate, 358 So.2d at 301.

[18]However, the state must proceed to show that the method that it has chosen to accomplish that government interest ... is substantially related to achieving that objective. *Kirchberg v. Feenstra, supra*, 609 F.2d at 727. The State of Louisiana has throughout allowed plaintiff to undertake its interest, unquestionably because the defect has been legislatively corrected.

There is no justification for Article 2386 that has not already been raised and rejected. Among justifications the following have been offered:

1. Evens up the wife's rights, a balance so to speak, against other inequities in favor of the husband. Rejected in *Orr v. Orr, supra.*
2. Helps women in an adjustment period when they are unprepared for the exigencies of the market place. Rejected in *Orr v. Orr, supra,* who also added that any woman who paid alimony to a man was already well cushioned enough (figuratively, of course) to beat the wolves away from the doors of her estate. Besides, said the *Orr* Court, this aided only the rich. The same can be said of Article 2386. The needy normally have no paraphernal property. Or to put it more succinctly and in a more relevant circumstance, Mrs. Oettinger has more properties than Mr. Oettinger.
3. The husband could have avoided his problem by a premarital contract. Rejected in *Trimble v. Gordon, supra,* and in *Kirchberg v. Feenstra, supra,* by both the Fifth Circuit Court of Appeals and the Supreme Court. Mr. Oettinger did not even have Mrs. Feenstra's rights; once married he could file nothing.
4. Women just need a little extra help. Rejected by virtually every court. The *Orr* decision makes the interesting counter-argument that overprotection may insure that the cripple will never walk, or something like that.

We are persuaded that Article 2386 was a gender-based classification which did not accomplish a worthy governmental objective and that it therefore violated the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution. We further suspect from reading the cases that appellee's counsel may be the only legal scholar who currently disagrees with that. We further contend, and the decisions abundantly support this proposition, that it is totally irrelevant whether the Court applies this decision

prospectively or retroactively; Mr. Oettinger is entitled to relief. Even prospective application requires this.[19]

THE REMEDY

If Mr. Oettinger was unconstitutionally discriminated against, what should be his remedy? Logically, two alternatives are available:

a. Take away Mrs. Oettinger's rights under 2386 and, in effect, nullify the article. In this result, both parties would be obligated to account for the income from their separate estates.

b. Grant Mr. Oettinger the same right under 2386 and credit him with having exercised it. This would allow the income from both separate estates to remain separate.

We would urge the latter remedy for several considerations, all of which we believe are valid and substantial. Mrs. Oettinger's first husband was a prominent Shreveport attorney, and it was his former law firm that filed both declarations (one before and one after) in behalf of Mrs. Oettinger. Presumably, her attorneys explained the reasons for the filing, and we are persuaded that she relied on the *declaration to preserve her separate estate.* Nullifying her declaration would disturb the expectations on which she relied, *i.e.,* the preservation of her estate for herself and her son. We are less in sympathy with any reliance she may claim for one-half of the accretion of the estate of Mr. Oettinger who himself has needs *and* children. We argue this without really knowing who would benefit if both were denied the protection of Article 2386.

---

[19]See *Succession of Brown,* 379 So.2d 1172, *aff'd,* 388 So.2d 1151 (1980); *Kirchberg v. Feenstra,* 609 F.2d 727, *aff'd,* 67 L.Ed.2d 428 (1981); *Cipriano v. Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969); *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *United States v. Wade,* 388 U.S. 293, 87 S.Ct. 1926, 18 L.Ed.2d 1149; *Gilbert v. California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178; *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940); *United States v. Donnelly,* 397 U.S. 286, 90 S.Ct. 1033, 25 L.Ed.2d 312 (1970); *Califano v. Goldfarb,* 430 U.S. 199 97 S.CT. 1021, 51 L.Ed.2d 270 (1977); *Weinberger v. Wiesenfield,* 420 U.S. 636 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); and many, many more.

The second remedy is not only more equitable, it has jurisprudence to recommend it. Professor Lee Hargrave, Constitutional Law Professor at LSU Law School, has stated: "A proper solution would be to avoid the question of retroactive or prospective application and simply say the proper remedy, as in most equal protection cases, is to extend the benefit in question to the excluded class." (This followed his explanation that prospective applications gives relief to the litigant.) See 41 *La.L.Rev.* at p. 534. See our brief *supra,* at footnote on page 16 for the full quotation. Professor Hargrave cited three cases but he could have cited many more. Invariably, the solution in these cases has been to grant the right to the one formally excluded. This cures the constitutional deficiency. (Note, this was done in *Succession of Brown, supra.*) In this case such a solution has several advantages:

a. It would require no accounting. Mrs. Oettinger keeps her separate estate and its additions; Mr. Oettinger keeps his. The testimony and records show (and both testified accordingly) that there was no commingling of funds. Mr. Oettinger was obviously trying to maintain his property intact.

b. It is equitable. Mr. Oettinger knew nothing of the Louisiana law. He kept records to protect his separate estate; he did nothing to impair hers and, we contend, actually helped Mrs. Oettinger's estate. Mrs. Oettinger would keep her estate intact which is equitable; it strains equity to let her ravage his estate.

c. No outside party can complain.

d. No one's vested rights are disturbed. Mrs. Oettinger had no vested rights within the legal meaning, only "expectations" when they separated and her "expectations" have been constitutionally challenged

e. The Court can apply its ruling prospectively, only. It can give only this party relief; it can allow relief to others without final disposition of their property rights.

f. The lower court had no difficulty isolating the accretions to Mr. Oettinger's estate which he had when he entered this unfortunate union. He kept excellent records.

The danger to us in this case is not from the law. Article 2386 was clearly unconstitutional; everybody knows that. That is why the legislature changed it and provided husbands with the same rights as wives in the preservation of their separate estates. The law also compels relief to Mr. Oettinger whether applied prospectively or retroactively. No, we have faith in our legal contentions. What concerns us is the attraction to the Court of ignoring the unconstitutionality of Article 2386, and carrying out the old law. Why not? It would send out no shock waves. Besides, Article 2386 is gone; the law is changed; and from here on there will be few Mr. Oettingers thrashing around in the bear trap. With any luck this should be the last case the Court will see under the old law. If Article 2386 is unconstitutional, let the higher courts say so.

This is the smooth, scenic path, the one of least resistance. The Court can pass the legal baton to someone else. But it would not be right. The strength of any judiciary, the earned dignity of any Court, is its courage to apply law and not shrink from tough decisions. This case is not an exercise in promoting legal harmony or in not making waves; it is principally an exercise in doing justice to a litigant. It may well be that no other litigant will ever be so situated as to make this constitutional challenge — that hardly matters. What does matter is that Mr. Oettinger came to the Courts for justice which in our system is a right, not a privilege. If any litigant is sacrificed to avoid holding a clearly unconstitutional law invalid, the system has been damaged by just that much. Mr. Oettinger deserves his rights just as though he represented a class of thousands or the Chase Manhattan Bank. How anyone reading the jurisprudence could constitutionally validate Article 2386 is beyond our comprehension. We ask that this Court hold Article 2386 as uncon-

stitutional.

Perhaps this is not an issue of the compelling importance of school prayers, capital punishment and abortion. After all, since these parties took up the legal cudgel, the community property laws of Louisiana have been totally revamped so that all gender based distinctions have been excised. But it remains of paramount concern to thousands of Louisiana residents (and perhaps residents of other community property states) who, although separated or divorced, have not yet concluded community property settlements; whose rights depend on the validity of the laws of the past. And, of course, there is Mr. Oettinger. The solemn principle of every free society that the rights of every person, rich and poor, deserves the highest protection must and should be continually affirmed.

CONCLUSION

For these reasons, this court should note jurisdiction of this appeal and afford relief to this appellant. Simple justice demands no less.

Respectfully submitted,

JOHNSTON & THORNTON

By: _____
James J. Thornton
642 Stoner Avenue
Shreveport, Louisiana 71101
(318) 221-6294

and

HUNTER & JACK
Suite 101 Energy Square
212 Texas Street
Shreveport, Louisiana 71101
Counsels for Appellant

APPENDIX A

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA
No. 16,720-CA

Leona Gordon Oettinger — *Plaintiff-Appellee*

v.

Albert Oettinger — *Defendant-Appellant*

Appeal from the First Judicial District Court
Parish of Caddo, State of Louisiana

Hon. C.J. Bolin, Jr., Judge

HUNTER & JACK;
JOHNSTON & THORNTON
by James J. Thornton, Jr. — Attorneys for Defendant-Appellant

LOVE, RIGBY, DEHAN,
LOVE & McDANIEL
by Kenneth Rigby — Attorneys for Plaintiff-Appellee

Before HALL, FRED W. JONES and PRICE, JJ.

FRED W. JONES, J.

Leona Gordon Gamm Oettinger sued Albert Oettinger for the partition of property allegedly belonging to their community of acquets and gains which was dissolved on July 27, 1978. The defendant answered and reconvened, seeking reimbursement of separate funds and payment for enhancement of Mrs. Oettinger's separate estate. Oettinger also asserted the unconstitutionality of various pre-1980 matrimonial regime laws.

The trial judge ruled that all assets in Oettinger's possession on July 27, 1978 belonged to the community, except some shares of stock that Oettinger acquired before the marriage; that the community should reimburse Oettinger for separate funds invested for the benefit of the community; that all assets in the possession of Mrs. Oettinger on July 27, 1978 belonged to her separate estate; and that all costs should be assessed against the community.

Oettinger appealed, contending that (1) La. C.C. Article 2386 violated the equal protection clause of the 14th Amendment to the U.S. Constitution in that it allowed a wife but not a husband to file a declaration of paraphernality; (2) the "double declaration"[1] rule also violates the same clause of the 14th Amendment because it places a greater burden on the husband than the wife to establish separate property; and (3) application of Act 709 of 1979[2] should be employed to eliminate the "double declaration" rule.

For the reasons hereinafter explained, we affirm the judgment of the district court.

---

[1]"The double declaration requirement, 'well-established' in our law, makes it necessary that conveyances of immovable property, to the husband for a recited consideration during the existence of the community, contain recitations that the property is acquired (1) with his separate funds and (2) for his separate use and administration, as a prerequisite to his later proving that the property is *not* community, but separate. In the absence of the double declaration, property so acquired by the husband is conclusively presumed to be community." *Barnett v. Barnett*, 339 So. 2d 495, 496 (La. App. 2d Cir. 1976), writ refused 341 So. 2d 1127.

[2]Act 709 of 1979, effective January 1, 1980, substantially revised Louisiana matrimonial regimes law. This act was passed upon recommendation of the Joint Legislative Subcommittee on Equal Management, its Advisory Committee, and the Louisiana State Law Institute.

The facts of this case are undisputed. The Oettingers, each of whom had been previously married, were married on November 23, 1967. Each had substantial assets prior to this marriage.

On November 14, 1967 and again on December 19, 1967, Mrs. Oettinger filed declarations of paraphernality under then La. C.C. Article 2386. Oettinger was unaware of either declaration.

It is apparent from the record evidence that during their marriage the parties attempted to maintain their finances separately. Oettinger gave his wife an allowance to defray part of the expense of operating their household. Their dwelling belonged to Mrs. Oettinger's separate estate. They never made any major purchase jointly nor did they invest together.

Assets possessed by Oettinger at the dissolution of the community were purchased with money held in his personal checking account. Funds from various sources were placed in this account, including the following: $235,150 drawn from his business as salary; money derived from the sale of stock belonging to his separate estate; proceeds from investments.

Oettinger argues that he kept careful records of all money going into and out of his bank account and that it is possible to distinguish between community and separate funds. We agree with the trial judge, however, that the funds in this account were co-mingled to the extent that they became indistinguishable. Consequently, this checking account must be characterized as belonging to the community and any purchases made therewith belonged to the community. *Gregory v. Gregory*, 223 So. 2d 238 (La. App. 3rd Cir. 1969); *Odom v. Odom*, 121 So. 2d 8 (La. App. 2d Cir. 1960).

In light of this holding, it is unnecessary to discuss Oettinger's contentions concerning his heavier burden of proof, the unconstitutionality of the "double declaration" rule, or the suggested retroactivity of Act 709 of 1979.

Addressing the status of the property held by Mrs. Oettinger on July 27, 1978, it is clear that the application of then La. C.C. Article 2386 and the declarations of paraphernality filed by Mrs. Oettinger resulted in the classification of the fruits of her separate property as belonging to her separate estate. Conversely, our law provided no such option to Oettinger.

La. C.C. Article 2386 stipulated:

> Article 2386. The fruits of the paraphernal property of the wife, wherever the property be located and however administered, whether natural, civil, including interest, dividends and rents, or from the result of labor, fall into the conjugal partnership, if there exists a community of acquets and gains; unless the wife, by written instrument, shall declare that she reserves all of such fruits for her own separate use and benefit and her intention to administer such property separately and alone. The said instrument shall be executed before a Notary Public and two witnesses and duly recorded in the Conveyance Records of the Parish where the community is domiciled.
>
> If there is no community of gains, each party enjoys as he chooses, that which comes to his hand; but the fruits and revenues which are existing at the dissolution of the marriage, belong to the owner of the things which produce them.
>
> [Repealed by Act 709 of 1980]

The issue posed is as follows: was this article unconstitutional (violative of equal protection clause of 14th Amendment) insofar as it permitted the wife but not the husband to unilaterally prevent the fruits of her paraphernal property from becoming community property?

"To withstand scrutiny under the Equal Protection Clause, classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Orr v. Orr,* 440 U.S. 268,269, 99 S.Ct. 1102,1106 (1979). Scrutiny of gender based classifications is

an intermediate test which takes a closer look than the "minimum rationality" test but falls short of the strict scrutiny given suspect classifications.

The intermediate test has both upheld and struck down statutes, unlike the "minimum rationality" test which invariably upholds the statute in question and the "strict scrutiny" test which usually strikes down the statute involved. Some gender based classifications which have been nullified include: a law which made the legal drinking age for males 21 and females 18, *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451 (1976); a law which made the age of majority for females 18 and males 21, *Stanton v. Stanton,* 421 U.S. 7, 95 S.Ct. 1373 (1975); a law which preferred men as administrators of estates, *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251 (1971); a law which presumed the female spouse of an Air Force officer to be dependent and presumed the male spouse of an Air Force officer to be independent, *Frontiero v. Richardson,* 411 U.S. 677, 93 S.CT. 1764 (1973); a law which only provided alimony for wives, *Orr v. Orr,* supra; and the Louisiana "head and master" law which allowed a husband to unilaterally mortgage the family home without according the wife the same right, *Kirchberg v. Feenstra,* 450 U.S. 455, 101 S.Ct. 1195 (1981).

Some gender based classifications which have been upheld include: a criminal statute which punishes men and not women for statutory rape, *Michael M. v. Superior Court of Sonoma County,* 450 U.S. 464, 101 S.Ct. 1200 (1981); a law precluding a father who has not legitimated a child from suing for the wrongful death of the child, *Parham v. Hughes,* 441 U.S. 347, 99 S.Ct. 1742 (1979); a statute which allows women a longer period of time to make mandatory promotions, *Schlesinger v. Ballard,* 419 U.S. 498, 95 S.Ct. 572 (1975); a statute which grants widows but not widowers a property tax exemption, *Kahn v. Shevin,* 416 U.S. 351, 94 S.Ct. 1734 (1974); a law which requires men but not women to register for the

draft, *Rostker v. Goldberg*, 453 U.S. 57, 101 S.Ct. 2646 (1981); and a statute allowing women to eliminate low-earning years from calculation of Social Security retirement benefits, *Califano v. Webster*, 430 U.S. 313, 97 S.Ct. 1192 (1977).

In the case before us, the declaration of paraphernality is a means that is substantially related to the important state interest of allowing wives an opportunity to manage their own separate property on an equal basis with their husbands. While other means may have been better, our role is not to supplant the legislature's judgment with our own. Strict tailoring of the means to the end is required in laws employing "suspect classifications" but not statutes utilizing gender based classifications.

Civil Code Article 2386 as amended by Act 286 of 1944 allowed the wife opportunity to manage her own separate property and the fruits of her separate property just as her husband was allowed to do. The classification of the fruits of the wife's separate property as separate was a means whereby she was allowed management of fruits which would normally fall under her husband's management as "head and master" of the community. Consequently, we do not declare a law which attempts to establish parity between a wife and her husband unconstitutional.

We find the cases of *Kahn v. Shevin*, supra, and *Califano v. Webster*, supra, particularly convincing. In both cases an inequity in treatment was remedied in part by a law favoring the class who had been subjected to disadvantage. In both cases the law was upheld even though it did not solve the whole problem and benefited some who had not suffered.

Therefore, we affirm the trial court judgment and assess all costs of this appeal to appellant.

APPENDIX B

Leona Gordon Oettinger	Number 254,392
vs.	First District Court
Albert Oettinger	Caddo Parish, Louisiana

OPINION

This is an action for the partition of former community property and for settlement of the former community existing between Leona Gordon Oettinger and Albert Oettinger. The main obstacle to the resolution of this dispute has been a plea of unconstitutionality filed by the defendant, Mr. Oettinger. Mr. Oettinger has challenged certain features of the pre-1980 Louisiana community property laws to the extent those laws affect the settlement of this case. For reasons set forth below, it is the opinion of this court that the constitutional challenge asserted by the defendant must be dismissed and judgment rendered for the plaintiff, Leona Gordon Oettinger.

Specifically, the main issues raised by this case are: (1) whether Louisiana Civil Code Article 2386 (as it existed prior to the revision which went into effect January 1, 1980) was unconstitutional inasmuch as it provided an instrument available only to females and thereby denied men of the equal protection of the laws; and (2) did the jurisprudentially created "double declaration" rule, since it applied to husbands only, similarly unconstitutionally discriminate against men.

The facts from which these issues spring may be summarized as follows: The parties were married to each other on November 23, 1967, in Caddo Parish, Louisiana. Their matrimonial domicile was maintained in Caddo Parish during the entire marriage. Mrs. Oettinger filed suit for separation of bed and board on July 27, 1978. She filed a petition for a divorce afterwards, and the parties were divorced in a judgment rendered April 9, 1980.

Shortly before their marriage, the plaintiff recorded in the Conveyance Records of Caddo Parish, Louisiana, on November 14, 1967, a declaration of paraphernality under Civil Code Article 2386. In it she reserved to herself all fruits of her separate paraphernal property for her own separate use and benefit. The declaration also stated it was her intention

to administer such separate property alone. Again, shortly after the marriage ceremony, the plaintiff, on December 19, 1967, executed another almost identical declaration and recorded it in the Caddo Parish Conveyance Records.

This case, then, arises essentially because of the existence of these recorded declarations of paraphernality executed by Mrs. Oettinger. The defendant, Mr. Oettinger, disputes the constitutional validity of the law which provided the plaintiff with such a mechanism for reserving to herself the separate property she had prior to entering into the marriage and income therefrom earned after marriage, but which provided no similar mechanism for men entering into marriage.

A well understood and accepted basic legal fact of life in Louisiana is that upon dissolution of a marriage under a community property regime, any property of the former community is divided equally between the former spouses, (see C.C. Art. 2406). Their community, under former C.C. Art. 2402, consisted of:

> "...the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase."

Furthermore, according to C.C. Art. 2405, all property "reciprocally possessed" by the spouses at the time of dissolution of the marriage is *presumed* to be community property unless satisfactorily proved to be separate property. And as community property, it is subject to equal division between the spouses.

Also considered community property, is separate property which has been "commingled" with community property.

Nonetheless, the presumption of the community character or property "reciprocally possessed" may be overcome, but the task is made easier for the wife under Louisiana law.

Generally state laws and legislative classifications are valid unless they bear no rational relationship to a permissible state objective. While the present statute does discriminate on the basis of sex and is subject to scrutiny to make certain it does not violate the Equal Protection Clause, it does meet acceptable standards, because it serves important governmental objectives and is substantially related to achievement of those objectives.

In *Califano v. Webster*, 430 U.S. 313, 51 L.Ed.2d 360, 97 S.Ct. 1192, the Supreme Court upheld a statutory gender-based distinction created in provisions of the Social Security Act. Finding that there existed in fact historic inequalities in the earnings of men and women, the Court allowed redress of the situation vis-a-vis a provision which allowed women, but not men, to eliminate additional low-earning years from the calculation of their retirement benefits.

All the above considerations should be imposed upon C.C. Art 2386 to determine whether it can withstand constitutional scrutiny. This Court agrees with the plaintiff that the applicable Louisiana laws in question do indeed pass such an inspection. To quote from the plaintiff's reply brief:

> "The granting to her of the right to withdraw from her husband the administration of her separate property, and the resultant conversion of the fruits of that separate property from community to separate property, serves the important governmental objective of supplying the wife with a limited degree of protection with respect to her separate property against her husband, and it is certainly related to the achievement of that objective. It is in no wise the result of archaic or overbroad generalizations about women, nor does it support

or perpetuate the role-typing that society has long imposed on women, such as a casual assumption that women are the weaker sex and are more likely to be child-rearers or dependents and are not suitable for the business world. On the contrary, it gives her the right to enter the business world, to manage her own separate affairs, separate and apart from her husband, giving her the right to make decisions, to invest her money, to spend, to borrow it, to lend money, to invest it either wisely or foolishly, and make all of the other decisions that she may make with respect to it. Nor does it invidiously discriminate in her favor against her husband. Her husband is given, by law, without any action on his part or that of his wife, the right of administering not only the community property, and his own separate property, but also that separate property of his wife. The only protection afforded the wife is this limited one of the withdrawal from his administration of her separate estate, so that she may administer this limited portion of her estate herself, free of the control and management of her husband. She has no right to withdraw from her husband the administration of her half of the community estate. Nor is she given any concomitant right to administer her husband's separate estate. Right or wrong, constitutional or unconstitutional, these are the facts of life in the former community law statutory scheme."

Under the decisions of the United States Supreme Court and others, C.C. Art. 2386 is constitutional. Therefore, the declaration of paraphernality drafted and recorded by Mrs. Oettinger is valid and effective. As such, the separate property she possessed prior to her marriage is still separate, along with the fruits thereof.

The defendant has also attacked the constitutional validity of the "double declaration" rule. That jurisprudentially created law affected the acquisitions of immovable property by the husband during the existence of the community. As already pointed out in this opinion, property in the hands of

the spouses at termination of the marriage was and is presumed to be community.

It should not be necessary to rehash the entire history of all the litigation which has already occurred in Louisiana courts concerning the "double declaration" rule. Suffice it to say this Court agrees again with the reasoning on this issue set forth in the opinions of Louisiana Courts in *Lewis v. Clay*, 221 La. 663, 60 So.2d 78, (La. 1952), *Primeaux v. Liberstadt*, 307 So.2d 740 (3rd Cir. 1975), and *Barnett v. Barnett*, 339 So.2d 495 (2d Cir. 1976) writ refused 341 So.2d 1127. In addition, to do otherwise would risk disrupting the stability and security of land titles in Louisiana.

The evidence in this case, introduced by stipulation, shows that the defendant, Mr. Oettinger, owned a portfolio of stocks and bonds on November 23, 1967, when the marriage began, of a total market value of $134,402.50. Shortly thereafter, he began to sell off his portfolio and replace them with other stocks and bonds and invest in the oil and gas business. All funds received from these investments were reinvested, together with funds derived from a large loan secured by pledge of stocks and bonds in his portfolio. At the termination of the community on July 27, 1978, his portfolio of stocks and bonds was valued at $610,811.24, which included $1,875.00 represented by 300 shares of Uris building stock remaining from his original separate portfolio, and stock in Display Research Associates, Inc. likewise owned before marriage. In addition, he owned interests in a large number of valuable oil, gas and mineral leases.

All of the above properties, except the two stocks above mentioned, were acquired during the community and are presumed to be community property, which presumption has not been rebutted. It is further the opinion of this Court that the infusion of the funds derived from the sale of most all of Mr. Oettinger's original portfolio of stocks and bonds resulted

in a substantial benefit to the community and without which the community would not have prospered so dramatically. His salary and income from investments was not sufficient to enable him to make the necessary capital outlay to buy other stocks and bonds for his portfolio and to engage in the oil and gas business. He is entitled to reimbursement for the above amounts, because of the enhanced value of the community property and the fact that the community still has the benefit of that enhancement.

In spite of strenuous argument by plaintiff to the contrary, it would be hard to find a clearer case to show that the infusion of his separate identifiable funds were employed and enhanced the value of the community property. The case of *Lane v. Lane* (1978) 375 So.2d 660, at page 675, allowed reimbursement to the husband for separate identifiable funds as used which were derived from sale of his separate portfolio of stocks and bonds and which was re-invested in the portfolio which had increased substantially.

Plaintiff argued strenuously that the increase in the value of the oil and gas properties and the increase in the portfolio was not due to the use of the separate property of defendant but was only due to his labor and industry. This argument overlooks the benefit previously stated by the Court, that is that the infusion of the proceeds of the sale of defendant's separate stocks and bonds made it possible for the community to later participate in the dramatic increase in value and enhancement resulting.

There should be judgment for plaintiff overruling the Plea of Unconstitutionality by the defendant. All assets in the possession of Mr. Oettinger on July 27, 1978 should be declared to the community, except the ownership in the two shares of stock previously described and Mr. Oettinger should be ordered to account for all revenues and income therefrom subsequent to that date. There should be further judgment in favor of

defendant, Mr. Oettinger, and against Mrs. Oettinger for reimbursement from the community property of a total amount of $134,402.50, less the value of the two stocks above indicated. All costs are to be assessed against the community assets.

It is suggested that counsel set a Court date on the earliest Monday for argument as to the form of the judgment to be signed by the Court.

This the 22nd of December, 1982.

/s/ C.J. Bolin, Jr., Judge

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF LOUISIANA

Leona Gordon Oettinger
vs. NO. 85-C-0366
Albert Oettinger

IN THE COURT OF APPEAL,
SECOND CIRCUIT, STATE OF LOUISIANA

Leona Gordon Oettinger
vs. NO. 16,720-CA
Albert Oettinger

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

Notice is given that Albert Oettinger, Appellee, hereby appeals to the Supreme Court of the United States of America from the final judgment of the Court of Appeal, Second Circuit, State of Louisiana, dated January 23, 1985, (writ refused) which judgment affirmed a judgment of the trial court in favor of Leona Gordon Oettinger, Appellee.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

JOHNSTON & THORNTON

By: _____
James J. Thornton
642 Stoner Avenue
Shreveport, Louisiana 71101
(318) 221-6294

Counsel for Appellant

LOUISIANA COURT OF APPEAL, 2d CIRCUIT
FILED JUNE 18, 1985

APPENDIX D

Art. 2386. The fruits of the paraphernal property of the wife, wherever the property be located and however administered, whether natural, civil, including interest, dividends and rents, or from the result of labor, fall into the conjugal partnership, if there exists a community of acquets and gains; unless the wife, by written instrument, shall declare that she reserves all of such fruits for her own separate use and benefit and her intention to administer such property separately and alone. The said instrument shall be executed before a Notary Public and two witnesses and duly recorded in the Conveyance Records of the Parish where the community is domiciled.

If there is no community of gains, each party enjoys, as he chooses, that which comes to his hand; but the fruits and revenues which are existing at the dissolution of the marriage, belong to the owner of the things which produce them.

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing brief and appeal have been served on appellee by placing a copy of it in the mails, sufficient postage prepaid and addressed to Mr. Kenneth Rigby, Attorney at Law, 600 Johnson Building, Shreveport, Louisiana, Counsel of record for appellee, on this _____ day of June, 1985.

_____

OF COUNSEL

MOTION

No. 84-2011

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LEONA GORDON OETTINGER,
Appellee,

v.

ALBERT OETTINGER,
Appellant.

On Appeal from the Court of Appeal, Second Circuit
State of Louisiana

MOTION TO DISMISS

KENNETH RIGBY
LOVE, RIGBY, DEHAN, LOVE & MCDANIEL
600 Johnson Building–412 Milam St.
Shreveport, Louisiana 71101
Attorney for Appellee

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES continued

TABLE OF AUTHORITIES continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-2011

LEONA GORDON OETTINGER,
Appellee,

v.

ALBERT OETTINGER,
Appellant.

On Appeal from the Court of Appeal, Second Circuit
State of Louisiana

MOTION TO DISMISS

Appellee moves that the appeal herein taken be dismissed on the ground that said appeal does not present a substantial federal question.

STATEMENT OF THE CASE

The parties were married to each other November 23, 1967, maintaining their domicile in Louisiana dur-

ing the marriage. By operation of law, they became subject to the Louisiana community property regime. Mr. Oettinger brought into the marriage investments totalling $134,402.50. Mrs. Oettinger, the widow of an attorney and oil and gas investor, owned in indivision substantial oil and gas and other properties with her late husband's family, as well as enjoying the usufruct (use and income) on the property of her husband inherited by their son. Under Louisiana law the husband had the right to administer the wife's paraphernal property absent the filing by the wife of the declaration of paraphernality provided for in LSA-C.C. 2386. Mrs. Oettinger filed such a declaration, in order to obviate the necessity of security the consent of Mr. Oettinger and his signature with respect to the paraphernal properties owned by her, her son, and her late husband's family. The community of acquets and gains existing between the parties was terminated on July 27, 1978, the date upon which Mrs. Oettinger filed a suit for a judicial separation. The parties were divorced April 9, 1980.

Appellant claimed that LSA-C.C. 2386 was violative of the Equal Protection Clause. The Trial Court and the Court of Appeal rejected this contention, both holding that statutory provision to be constitutional. The Louisiana Supreme Court denied a Writ of Review.

FUNCTION OF LSA-C.C. 2386 IN LOUISIANA COMMUNITY PROPERTY LAW

LSA-C.C. 2386, as amended by Act 286 of 1944, gives the wife the right to file the type of declaration filed by Mrs. Oettinger in the case at bar, while depriving

the husband of the same right. Basically, it permits her to reserve all of the fruits of her paraphernal property as her separate property, and to administer them separate and apart from her husband. Upon the recordation of the declaration, and the *in fact* administration of those fruits and revenues separate from her husband, those rents and revenues are her paraphernal[1] property rather than community property. The husband does not have a corresponding right; all of the revenues from his property, whether community or separate, are community property.

In determining whether or not that article unconstitutionally confers upon women rights not similarly conferred upon men, the article cannot be examined in isolation. It must be examined as a part and parcel of a statutory scheme establishing and regulating the community of acquets and gains existing between husbands and wives in the State of Louisiana.

The rights of the parties to this action are governed by the Civil Code Articles and other statutory provisions extant prior to the adoption of the Matrimonial Regimes Act, Act 709 of 1979, effective January 1, 1980. In the case at bar, the community was terminated prior to January 1, 1980; therefore, the rights of the parties are regulated by the pre-1980 law. All references will be to that law, unless otherwise indicated.

---

[1] LSA-C.C. 2386 is applicable only to the wife's *paraphernal* property, one of two types or species of her *separate* property, the other being her *dowry*, or *dotal* property. All of the husband's non-community property is classified as his separate property, the husband not possessing a dowry, or dotal property. See Rigby, "Some Views, Old and New, on Recent Developments in Family Law." 29 *La. Bar Journal*, No. 5 p 232 (1982).

Under the statutory scheme prior to that Act, Louisiana citizens had the option of entering into a pre-marital agreement in which they could contract that there would be no community of acquets and gains existing between them,[3] or they could modify the community in any manner that they chose,[4] with a few limited exceptions that were prohibited.[5] The parties did not enter into a pre-marital agreement. Therefore, by the provisions of that law, the statutory scheme known as the community of acquets and gains, including the provisions complained of, became applicable to their marriage relationship.[6] This statutory scheme conferred upon Mr. Oettinger substantial rights, because he was a man, the husband, rather than a woman, the wife. He became the head and master of the community.[7] With very limited exceptions, he could alienate all community assets and incur community obligations without the knowledge and consent or permission of his wife, and even in spite of her opposition and protest.[8] He could, with limited exceptions, sell, mortgage, or give away all of the community assets, even though the wife owned and was vested, at time of acquisition, with an undivided one-half interest in the community assets acquired.[9] He could obligate the community for any debt of any nature, good or bad, wise or foolish, and irrespective of whether he was the sole beneficiary of the obligation or whether his wife received any benefit from it in any manner.[9] The community assets were even liable for his separate debts.[10] He was the sole manager and administrator of the community.[11] He was everything that the term "head and master of the community" implies, being absolute and unlimited in his power and authority, with a few statutory exceptions. For example, because of express statutory enactments to delimit the authority of the husband, he could not alienate or mortgage the homestead[12] or the furnishings therein,[13] under specific conditions.

Not only was he the administrator of all of the community property, he became the administrator of the wife's paraphernal property,[14] unless she expressly withheld that administration from him by recording the necessary affidavit.[15] If she failed to do this, not only was he the administrator of his wife's paraphernal property, with all of the above enumerated powers and authority with respect to it, the income from the wife's paraphernal property was in itself

---

[3] LSA-CC 2332.

[4] LSA-CC 2332, 2424.

[5] LSA-CC 2326.

[6] LSA-CC 2399.

[7] LSA-CC 2404.

[8] LSA-CC 2404.

[9] LSA-CC 2404.

[10] *Creech* v. *Capitol Mack, Inc.* (Sup. Ct. 1974) 287 So. 2d 497.

[11] LSA-CC 2404.

[12] LSA-R.S. 9:2801 et seq, prior to repeal.

[13] LSA-R.S. 6:587, prior to repeal.

[14] LSA-CC 2385, 2402, 2404.

[15] LSA-CC 2386.

community property,[16] being subject to his dominion and control and right of disposition. Additionally, upon dissolution of the community, one-half of that income belonged to him.[17]

The wife could not withhold or withdraw from the husband the administration of her dowry, or dotal property. LSA-C.C. 2347, 2349, 2350.

The husband also was the administrator of his own separate property. He did not have the right to withdraw from himself the administration of his separate property. Therefore, like the wife who did not withdraw from her husband the administration of her paraphernal property, the income from his separate property was, in itself, community property.

Therefore, unless the wife exercised the right granted to her to withdraw the administration of her paraphernal property from her husband, the husband was the administrator of the community property, the wife's paraphernal property and her dotal property, and his own separate property. The wife was the administrator of nothing and had no power or authority with respect to any of the three estates with the exception of the right of disposition of her paraphernal property.[18] With respect to the community property she had no authority whatsoever. She could not alienate or otherwise dispose of nor mortgage any community property. She was powerless to obligate the community for anything whatsoever, in her own right, with a few

---

[16] *Slater* v. *Culpepper* (Sup. Ct. 1953) 233 La. 1071, 99 So. 2d 348; CC 2386, 2402.

[17] LSA-CC 2406.

[18] *Roccaforte* v. *Barbin* (Sup. Ct. 1947) 212 La. 69, 31 So. 2d 521.

limited exceptions, such as supplying necessities for the family (food, clothing and shelter), but only after the husband had failed and refused to so supply them.[19] Every other act of hers with respect to the community was as the agent, express or implied, of her husband.[20] Even with respect to her paraphernal property, she could not spend, invest, or control its revenues in any manner. These were totally under the control of her husband.

In the statutory scheme that grossly favored the husband, the wife was granted few corresponding rights. With respect to the community property, her sole remedy was to seek a Separation of Property upon proof that her husband was grossly mismanaging the community or was guilty of fraudulent conduct with reference to it.[21] She was not granted any right of any nature whatsoever with respect to her husband's separate property and its administration. With respect to the administration of her own paraphernal property, she was given the right, under Article 2386, to withdraw the administration of it from her husband and to administer it herself. Thereupon, the income from her paraphernal property became her paraphernal property and not community property.[22] (There were slightly varying rules with respect to *earned* income, depending upon whether or not the wife was living with the husband).[23] She was not given this right

---

[19] *Watson* v. *Veuleman*, (3rd 1972) 260 So. 2d 123, 126.

[20] *Watson* v. *Veuleman*, supra.

[21] LSA-CC 2425-2437.

[22] *Abraham* v. *Abraham* (Sup. Ct. 1956) 230 La. 78, 87 So. 2d 735.

[23] See, for example, *Martin* v. *Ethyl Corp.*, C.A. 1965, 341 F. 2d 1, and LSA-CC 2334 and 2402.

with respect to her dotal property, which remained under the administration of her husband and whose income likewise was subject to the husband's uncontrolled right of disposition.

When taken within the context of the whole community property statutory scheme (as they must be under the cases discussed *infra*), the provisions of this article granting unto the wife the right to withdraw from her husband the administration of her paraphernal estate is not discriminatory in favor of the wife against the husband, but is a counter-balancing provision (one of few) in favor of the wife. As noted, in the absence of the exercise of this right of withdrawal, the husband was the administrator not only of the community property and his own separate property, but also of the paraphernal and dotal property of his wife. He was the one who made all of the decisions, not only with respect to what investments were to be made, what properties were to be sold, what properties were to be purchased, what properties were to be mortgaged or otherwise hypothecated, what debts were to be incurred, what monies were to be spent, the purposes for which they were to be spent, but *whose money was to be used,* i.e., (1) community money, (2) the paraphernal or dotal money of his wife, or (3) his separate money. The wife had no voice in any of these decisions. He could foolishly and recklessly invest or spend his wife's paraphernal or dotal money, lease his wife's paraphernal or dotal property, and obligate his wife's paraphernal or dotal estate, as well as the community and his own separate estate. He could make foolish investments with his wife's paraphernal or dotal funds and wise investments with his separate funds. In retrospect, if an investment turned out to

be wise, he could claim that it was an investment for the benefit of his separate estate; if foolish, the wife's paraphernal estate. Justice required that the wife be able to withdraw that management from him and to administer it herself. She still had no right to do the same with respect to her vested and presently-owned half interest in the community property; she was limited to the action for Separation of Property with its attendant requirement of proving *gross mismanagement* or *fraud* by her husband. If the statutory scheme was unconstitutional, it was unconstitutional because it discriminated in favor of the husband and against the wife and did not afford the wife equal protection of the law.

The only counterbalancing statutory relief afforded the wife was the right to withdraw from her husband's administration her paraphernal property by complying with LSA-C.C. 2386. This limited protection afforded the wife in this statutory scheme is not an invidious distinction based on the sex of the parties. The object of this legislation, LSA-C.C. 2386, was to afford some small degree of protection to a wife in the statutory scheme outlined above which granted the husband almost unlimited power with respect to community property and the wife's paraphernal and dotal property. The method, i.e., the right to withdraw from the husband the administration of the wife's paraphernal property, is reasonably related to the object of the legislation, i.e., affording the wife some protection against the husband and allowing the wife to administer her paraphernal property, in the same way the husband was granted the right to administer his separate property, the community property, and the wife's dotal property. The statute, in granting the wife this

power or authority, does not make an "overbroad generalization based on sex" and does not "demean the ability or social status" of women. Under the tests applied by this Honorable Court, it withstands Equal Protection muster and is constitutional.

PRESUMPTION OF VALIDITY OF STATUTES

In *Parham* v. *Hughes,* 441 U.S. 347, 60 L. Ed. 2d 269, 99 S. Ct. 1742 (1979), this Honorable Court reaffirmed the principle that state laws are generally entitled to a presumption of validity against attack under the Equal Protection Clause, that legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others, and that legislative classifications are valid unless they bear no rational relationship to a permissible state objective.

PROPER STANDARD OF "SCRUTINY" TO APPLY TO GENDER-BASED STATUTES

On page 18 of the defendant's brief, in discussing the case of *Stanton* v. *Stanton,* defendant's counsel makes the following statement:

> The opinion cited numerous cases holding that classifications based on sex are inherently suspect.

Cited in support of this statement are *Weinberger* v. *Wiesenfeld,* 442 U.S. 636, 43 L. Ed. 2d 514 (1975), *Schlesinger* v. *Ballard,* 419 U.S. 498, 42 L. Ed. 2d 610, 95 S. Ct. 572 (1975), *Geduldig* v. *Aiello,* 417 U.S. 484, 41 L. Ed. 2d 256, 94 S. Ct. 2485 (1974), *Kahn* v. *Shevin,* 416 U.S. 351, 40 L. Ed. 2d 189, 94 S. Ct. 1734 (1974), *Frontiero* v. *Richardson,* 411 U.S. 677, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973), and *Reed* v. *Reed,* 404 U.S.

71, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971). The statement in brief is in error on two counts. *Stanton* v. *Stanton* did not cite these cases as holding that classifications based on sex are inherently suspect. Additionally, these cases do *not* so hold, and a majority of this Honorable court has *never* adopted an "inherently suspect" classification for a gender-based statute. This court as late as 1981, in *Michael M. Petitioner* v. *Superior Court of Sonoma County,* 450 U.S. 464, 67 L. Ed. 2d 437, 101 Sup. Ct. 1200 (1981), expressly held that "we do not apply so-called 'strict scrutiny' to those classifications." Nor do any of the cases cited by counsel for defendant in his brief, noted above, so hold.

Therefore, a gender-based statute is not "suspect," as is a statute classifying persons by race and national origin.

PROPER APPROACH TO OR ANALYSIS OF THE CONSTITUTIONAL INQUIRY

We outlined in some detail earlier the part that Article 2386 plays in the Louisiana legislative scheme of community property, and the legislative purpose in the enactment of that article, enabling the wife to withdraw from the administration of her husband her paraphernal property. Upon that withdrawal, and the actual separate administration of her paraphernal property, the fruits of the same become her paraphernal property, rather than community property, as is the case when her paraphernal property is administered by her husband. We suggested that, in an equal protection analysis of this article, as well as any other statutory provision, the examination cannot be made

with a myoptic eye, focusing only upon the language of the statutory provision, but must be viewed with broad vision that includes the entire statutory scheme, to discern the object sought by the legislature by the inclusion of a particular statute within that scheme, with a determination then made as to whether or not the particular statute, when viewed within the whole scheme, runs afoul of constitutional principles; in this case, the equal protection clause of the 14th Amendment to the Constitution of the United States. Counsel for appellant takes issue with this analysis:

> Counsel may not assert that these articles must be balanced and viewed in *para materi;* we have found neither constitutional mandate nor Court decision in all these gender-based classification cases which supports such an ingenuous but unique legal approach. (Page 21 of Defendant's brief)

Appellee submits that this is not only the proper approach to the issue of the constitutionality of a statute, but that this approach is he one *in fact used* by this Honorable Court in reviewing equal protection cases.

CASES UPHOLDING GENDER-BASED STATUTES

Parham v. *Hughes,* supra, after reviewing *Reed, Stanton, Frontiero,* and *Craig* as cases in which statutes made overbroad generalizations based on sex entirely unrelated to any differences between men and women, or which demeaned the ability or social status of the affected class, stated:

> "*In cases where men and women are not similarly situated, however, and a statutory classification is realistically based upon the differences in their*

> *situations, this Court has upheld its validity.* (italics added) In Schlesinger v. Ballard, 419 US 498, 42 L Ed 2d 610, 95 S Ct 572, for example, the Court upheld the constitutionality of a federal statute which provided that male naval officers who were not promoted within a certain length of time were subject to mandatory discharge while female naval officers who were not promoted within the same length of time could continue as officers. Because of restrictions on women officers' seagoing service, their opportunities to compile records entitling them to promotion were more restricted than were those of their male counterparts. Thus, unlike the Reed and Frontiero cases where the gender-based classifications were based solely on administrative convenience and outworn cliches, the different treatment in the Schlesinger case reflected "not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service." 419 US, at 508, 42 L Ed 2d 610, 95 S Ct 572 (emphasis in original)."

In *Parham,* the Court upheld a Georgia statute that permitted only those fathers who had legitimated a child to sue for the wrongful death of the child, while imposing no such restriction on the mother of the child. "The fact is that mothers and fathers of illegitimate children are not similarly situated . . . (because) under Georgia law, only a father can by voluntary unilateral action make an illegitimate child legitimate."

In *Michael M.* v. *Superior Court of Sonoma County,* 405 U.S. 464, 67 L Ed 437, 10 S. Ct. 1200 (1981), a California statutory rape law under which men alone may be criminally liable for an act of sexual intercourse was held not violative of the Equal Pro-

tection Clause, because "Young women and men are not similarly situated with respect to the problems and risks associated with intercourse and pregnancy, and the statute is realistically related to the legitimate stated purpose of reducing those problems and risks."

Geduldig v. *Aiello,* 417 U.S. 484, 41 L. Ed. 2d 256, 94 S. Ct. 2485 (1974) held that a state unemployment compensation disability insurance program which does not pay benefits for disability that accompanies normal pregnancy and child birth does not amount to an invidious discrimination under the Equal Protection Clause of the 14th Amendment. The Court reaffirmed that "(T)he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."

Kahn v. *Shevin,* 416 U.S. 351, 40 L. Ed. 2d 189, 94 S. Ct. 1734 (1974) upheld as constitutional, as against an equal protection attack, a Florida statute that granted widows, but not widowers, an annual $500.00 property tax exemption. The Court found that "Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs." The Court found that this "disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer." Citing *Reed,* the Court held that Florida's different treatment of widows

and widowers "rest(s) upon some ground of difference having a fair and substantial relation to the object of the legislation." The Court noted that the state tax law was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."

Rostker v. *Goldberg,* 453 U.S. 57, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981), held that the Military Selective Service Act that authorizes the President to require registration of males and not females for potential conscription, is valid as against an equal protection attack.

In *Califano* v. *Webster,* 430 U.S. 313, 51 L. Ed. 360, 97 S. Ct. 1192 (1977), the provisions of the Social Security Act that allowed women, who as such have been unfairly hindered from earning as much as men, to eliminate additional low-earning years from the calculation of their retirement benefits, were held to be constitutional as against an equal protection attack, although the provisions treated women and men differently.

It is obvious from a reading of the opinions of this Court relied upon by the defendant and the plaintiff respectively that there are substantial differences in the statutes upheld and the statutes invalidated by this Court because of gender-based considerations. To pontificate that the United States Supreme Court has swept away all vestiges of differences between males and females is not only an over-simplification, but erroneous. A reading of the cases reveals that this Court has adopted the approach and analysis suggested as proper in this brief of Appellee.

CONSIDERATIONS IN THE CASES INVALIDATING GENDER-BASED STATUTES

It is obvious from a reading of the cases cited by both parties that it is those statutes, and only those statutes which perpetuate myths and stereotypes about women which this Court concludes are wrong, that have been invalidated. The following is a fair summary of the Supreme Court's view of the statutes that have been invalidated. The Court has stricken those statutes that contain "archaic and overbroad generalizations" about women, *Schlesinger* v. *Ballard,* that support "the role typing (which) society has long imposed" upon women, *Stanton* v. *Stanton,* such as casual assumptions that women are "the weaker sex" or are more likely to be child-rearers or dependents, or which perpetuate the "old notion" that "generally it is man's primary responsibility to provide a home and its essentials" and that "the female (is) destined for the home and the rearing of a family, and only the male for the market place and the world of ideas," *Orr* v. *Orr,* those which are an "accidental by-product of a traditional way of thinking about females," *Califano* v. *Goldfarb,* which contain "overbroad generalizations based on sex . . . which demean the ability or social status of (women)," *Parham* v. *Hughes,* or which draw a sharp line between the sexes solely for the purpose of achieving administrative convenience, *Reed* v. *Reed,* or which seek "an allocation of family responsibilities under which the wife plays a dependent role, and a seeking for their objective the reenforcement of that model among the State's citizens," *Orr* v. *Orr.*

CONSIDERATIONS IN THE CASES UPHOLDING GENDER-BASED STATUTES

The considerations in the cases upholding statutes containing gender-based classifications or distinctions are remarkably different. Although admittedly treating males and females differently and containing gender-based classifications, this Court has repeatedly upheld statutes which reflected that males and females were not similarly situated in a particular situation as a matter of fact, i.e., a statute granting female Naval officers greater tenure rights than male Naval officers because of the lesser opportunities for promotion for female Naval officers, *Schlesinger* v. *Ballard,* a Georgia statute granting a mother of an illegitimate child the right to sue for its death, but not the father, *Parham* v. *Hughes,* a California statutory rape law under which men alone may be criminally liable for an act of sexual intercourse, *Michael M.* v. *Superior Court of Sonoma County,* a Florida statute that grants widows, but not widowers, an annual $500.00 property tax exemption, *Kahn* v. *Shevin,* a Military Selective Service Act that requires a registration of males but not females, *Rostker* v. *Goldberg,* a state unemployment compensation disability insurance program that does not pay benefits for pregnancy, *Geduldig* v. *Aiello,* and a provision of the Social Security Act that grants to women, but not to men, the right to eliminate from their records their low-earnings years, *Califano* v. *Webster.*

None of the statutes or regulations upheld contained the stereotypes of women and their proper role in society proscribed in the cases relied upon by the defendant. Nor does LSA-C.C. 2386.

ANALYSIS OF LSA-C.C. 2386 IN LIGHT OF THE ABOVE CONSIDERATIONS

The provisions of LSA-C.C. 2386 represent a legitimate addressing by the Louisiana Legislature of a concern about the disparate position of the wife in the administration and right of disposition of community and separate property, as outlined earlier in this brief. It was one of the precious few protections granted the wife in the administration of the community property and her own paraphernal property in the community property scheme of Louisiana. This granted to her the right to withdraw from her husband the administration of her paraphernal property. The granting to her of the right to withdraw from her husband the administration of her paraphernal property, and the resultant conversion of the fruits of that paraphernal property from community to paraphernal property, serves the important governmental objective of supplying the wife with a limited degree of protection with respect to this portion of her separate property against her husband, and it is certainly related to the achievement of that objective. It is in no wise the result of archaic or overbroad generalizations about women, nor does it support or perpetuate the role-typing that society has long imposed on women, such as a casual assumption that women are the weaker sex and are more likely to be child-rearers or dependents and not suitable for the business world. On the contrary, it gave her the right to enter the business world, to manage her own paraphernal affairs, separate and apart from her husband, giving her the right to make decisions, to invest her money, to spend it, to borrow it, to lend money, to invest it either wisely or foolishly, and make all of the other decisions that she

may make with respect to it. Nor did it invidiously discriminate in her favor against her husband. Her husband is given, by law, without any action on his part or that of his wife, the right of administering not only the community property, his own separate property, but the paraphernal and dotal property of his wife. The wife was not given any concomitant right to administer her husband's separate estate. The only protection afforded the wife was this limited one of withdrawing from his administration her paraphernal estate, so that she may administer this limited portion of her estate herself, free of the control and management of her husband. She had no right to withdraw from her husband the administration of her half of the community estate or of her dotal property. Right or wrong, constitutional or unconstitutional, these are the facts of life in the former community law statutory scheme. The court should examine Article 2386 in the light of that statutory scheme and in light of the position of the wife with reference to the husband in the scheme, the same way the Court looked at the whole promotion scheme of the U. S. Navy, found that female Naval officers were at a disadvantage with reference to promotion as compared to male Naval officers, and upheld a statute granting them preferential retirement rights; the same way the Court looked at the Department of Labor figures on the relative earnings of men and women in the United States labor market, found that women generally earn less than men, and upheld a regulation permitting women, but not men, to eliminate certain low earnings years for Social Security purposes; the same way the Court looked at a fact of statutory rape that young women, but not young men, can get pregnant, and

upheld a statutory rape law that punished only males and not females for the offense; the same way that the Court looked at the Georgia inheritance statutes (not one, but the whole statutory scheme of inheritance, legitimation, and related statutes) and determined that since there were differences in proving parenthood between men and women and differences between men and women with respect to the legitimation of their children, that a statute that prohibited a father from suing for the death of his illegitimate child unless he had legitimated the child, while not requiring that of the mother, was not an invidious discrimination based on sex; the same way that the Court looked at the disparate economic impact of death upon widows and widowers and held that widows and widowers were in fact not similarly situated economically in the death of their respective spouses, and that, therefore, a Florida statute granting a property tax exemption to widows but not to widowers was constitutional, because widows and widowers were not in fact similarly situated in that particular situation of economics, death, and the payment of taxes; and the same way the Court considered a host of facts in deciding that the military registration law requiring only males, but not females, to register for the draft, was constitutional, because males and females are in fact not similarly situated with reference to military service (including statutes that prohibit the use of females in certain combat situations, including the flying of aircraft in combat, on Naval vessels in combat, etc., the same statutes and regulations that prevented female Naval officers from obtaining equal promotion opportunities with those of male Naval officers in *Ballard*).

LSA-C.C. 2386 is a legitimate legislative attempt to remedy an inequity in treatment of long standing in Louisiana. Although it did not solve the whole problem of inequity, and other means to do so may have been better, the law was substantially related to an important governmental function of permitting a wife to administer at least a part of her separate property on an equal basis with her husband. Full parity was not achieved: the husband still administered both his half and his wife's half of the community property, his wife's dotal property, and his own separate property. But the wife was given at least the right to administer a part of her own property, although still deprived of the right to administer or even participate with her husband in the management of her vested one-half interest in the community property, her dotal property, or her husband's separate property.

LSA-C.C. 2386 constitutes a legislative balancing of the wife's retention of management of her paraphernal property and consequent right of management over its revenues, against the husband's legislatively-mandated management of the community property, her dotal property, and his own separate property and his consequent control over and right of disposition of their assets and revenues. It may not have been an ideal solution, but the article bears a rational relationship to the permissible state objective of conferring upon wives this small degree of authority and protection in a statutory scheme that otherwise almost exclusively favored the husband.

Under the decisions of this Honorable Court, it is clear beyond question that LSA-C.C. 2386 is constitutional.

Nor is a substantial federal question presented in this case. As noted earlier, LSA-C.C. 2386 was repealed by Act 709 of 1979 effective January 1, 1980. The provisions of LSA-C.C. 2386 apply only to those communities terminated before January 1, 1980 and which are still unpartitioned or settled. Any ruling as to the constitutionality of the statute would have no general significance even in Louisiana, and none outside Louisiana.

CONCLUSION

Therefore, this Court should dismiss the appeal as lacking a substantial federal question.

Respectfully submitted,

KENNETH RIGBY
LOVE, RIGBY, DEHAN, LOVE & MCDANIEL
600 Johnson Building–412 Milam St.
Shreveport, Louisiana 71101

Attorney for Appellee

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing Motion to Dismiss has been served on appellant by placing a copy of it in the mails, sufficient postage prepaid and addressed to Mr. James J. Thornton, 642 Stoner Avenue, Shreveport, Louisiana, Counsel of record for Appellant, on this ——— day of ————, 1985.

_____
Of Counsel

OPINION

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(3)

SUPREME COURT OF THE UNITED STATES

ALBERT OETTINGER *v.* LEONA GORDON OETTINGER

ON APPEAL FROM THE COURT OF APPEAL OF LOUISIANA, SECOND CIRCUIT

No. 84-2011. Decided October 21, 1985

The appeal is dismissed for want of a substantial federal question.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

Appellant Albert Oettinger and appellee Leona Gordon Oettinger were married in Louisiana in 1967. Both had been married before, and both had substantial property of their own at the time of the marriage. Unbeknownst to appellant, at the time of the marriage appellee recorded a declaration of paraphernality under the authority of Article 2386 of the Louisiana Civil Code. This declaration allowed a wife to reserve for herself any fruits from her paraphernal property (nondotal property she brought into the marriage); it also gave her the right to manage such property and the fruits from such property. See La. Civ. Code Ann., Art. 2386 (West) (1972).* Under the Louisiana marital property laws

---

*Article 2386 stated:

The fruits of the paraphernal property of the wife, wherever the property be located and however administered, whether natural, civil, including interest, dividends and rents, or from the result of labor, fall into the conjugal partnership, if there exists a community of acquets and gains; unless the wife, by written instrument, shall declare that she reserves all of such fruits for her own separate use and benefit and her intention to administer such property separately and alone. The said instrument shall be executed before a Notary Public and two witnesses and duly recorded in the Conveyance Records of the Parish where the community is domiciled.

If there is no community of gains, each party enjoys, as he chooses, that which comes to his hand; but the fruits and revenues which are existing at

in effect at that time, the husband would, absent such a declaration, have the right to manage the fruits of the wife's paraphernal property, and those fruits would thus normally fall into the community property. See La. Civ. Code Ann., Arts. 2402, 2404 (West) (1972).

Under Louisiana law at that time, no similar provision existed for the husband. For a husband to reserve the fruits of his separate property to himself, he had to *prove* that they were separate property; a simple declaration was not possible for him. See La. Civ. Code Ann., Art. 2405 (West) (1972). Thus, although a husband had the right to manage his separate property (because he had the right under law, with certain exceptions, to manage all separate and community property), the fruits from that property that accrued during the marriage would normally become community property.

During their marriage, appellant and appellee attempted to maintain their finances separately. In 1980, they were divorced. In 1982, appellee sued for a partition of former community property and for settlement of the former community. Appellant, mindful of this Court's recent gender discrimination decisions, see *e. g.*, *Orr* v. *Orr*, 440 U. S. 268 (1979), challenged inclusion in the community of the property that he had brought into the marriage and of the fruits from that property on the ground that the Louisiana Civil Code provision that allowed the wife but not the husband to reserve the fruits of such property to herself by a mere declaration of paraphernality was an unconstitutional denial of Equal Protection. That provision, Article 2386, had been repealed by the Louisiana legislature in 1980, but appellee's declaration effected under it in 1967 remained valid.

The state trial court considered and rejected appellant's constitutional argument. The trial court noted that the laws effective in 1967 gave the husband, without any action on his part or his wife's part, the ability to manage the community

---

the dissolution of the marriage, belong to the owner of the things which produce them.

property, his separate property, and her separate property. Although the law did discriminate on the basis of sex, the trial court held that the paraphernality provision was substantially related to important governmental objectives. Specifically, the trial court held that the purpose of Article 2386 had been to "supply[] the wife with a limited degree of protection with respect to her separate property against her husband." Appendix to Jurisdictional Statement at B–3.

On appeal from this decision, the Louisiana Court of Appeal cited the legal standard set forth by this Court for addressing gender-discrimination cases, *i. e.*, a gender classification must be substantially related to an important governmental interest, noted the various gender discrimination cases of this Court—some of which upheld gender-based classifications and some of which struck them down, and concluded that the challenged provision was substantially related to the important state interest of 'allowing wives an opportunity to manage their own separate property on an equal basis with their husbands." Appendix to Jurisdictional Statement at A–6. The Court of Appeal concluded that any law attempting to equalize the status of wives and husbands could not be unconstitutional. The Supreme Court of Louisiana denied appellant's application for a writ of certiorari.

In his Jurisdictional Statement, appellant again asserts that the application of former Article 2386 constitutes a violation of Equal Protection. I believe that this argument presents a substantial federal question. Article 2386 treated husbands and wives differently. The only justification for this differential treatment that appears in the record was that of allowing the wife some parity in the management of her separate property. To begin with, this justification assumes that the overall statutory scheme governing the management of marital property, under which the husband is the automatic manager of all property owned by the spouses together or separately, is seriously suspect under our prior de-

cisions in this area. See, *e. g.*, *Kirchberg* v. *Feenstra*, 450 U. S. 455 (1981); *Orr* v. *Orr*, 440 U. S. 268 (1979). I believe that there is a substantial federal question as to whether a facially discriminatory provision may be justified on the ground that it is a remedial exception to an overall statutory scheme that is constitutionally defective. See *Parham* v. *Hughes*, 441 U. S. 347, 361–368 (1979) (WHITE, J., dissenting).

Further, I do not see that such a justification, even assuming its validity, can support a provision that enables a wife not only to manage the fruits of her paraphernal property but also to keep those fruits separate from the community property with a mere declaration, which latter ability is not given to her husband. I thus believe that there is also a substantial question as to whether the justification, even if valid, is adequately tailored to the asserted governmental interest.

Nor do I believe that the fact that Article 2386 is no longer in effect should prevent our considering this issue. Although it has been repealed, former Article 2386 remains relevant with respect to declarations filed before that date. Further, we have previously considered the application of a statutory scheme which had been repealed prior to our decision. See, *e. g.*, *Kirchberg*, *supra*, 450 U. S., at 459, n. 6. I do not believe that this fact renders the federal question presented by this case insubstantial. Consequently, I would note probable jurisdiction.